United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

573

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Nos. 22153, 22154, and 22442

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

BRIEF OF PETITIONER

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BRIEF OF PETITIONER

ISSUES PRESENTED FOR REVIEW

This case involves the Federal Power Commission's attempt, without holding a hearing, to (1) resolve various problems created by the Commission's abrogation of two contracts; and (2) interpret two settlement agreements and a related gas sales contract.

The questions presented by the Commission's action are:

1. Whether the Commission erred in holding that Tennessee, a purchaser of gas from Union, is not obligated pursuant to Union's filed rate to pay Union for

the gas received by Tennessee, the same rate per Mcf that Union pays Jupiter for the transportation of Union's production and the separation of very limited amounts of Union's condensate.

2. Whether the Commission erred in refusing to grant Union a hearing on the matters involved in the proceedings before the Commission.

STATEMENT OF THE CASE

A. Nature of the Case

Union Oil Company of California (Union) has filed a petition for review under section 19(b)[1] of the Natural Gas Act to set aside an order issued by the Federal Power Commission in docket Nos. RI63-212, GI6790, and RI68-111.[2]

The Jupiter Corporation (Jupiter) transports gas produced offshore of Louisiana by Union.[3] It separates and

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[1] 15 U.S.C. § 717r(b). Union's petition for review was initially filed in the United States Court of Appeals for the Fifth Circuit on July 22, 1968. Tennessee moved the Fifth Circuit to Dismiss Union's petition on the ground that the court did not have venue of the review proceedings. By order of October 21, 1968, the Fifth Circuit transferred Union's petition to this court where the petitions for review of Jupiter and J. Burton Liesse had been previously filed.

[2] Order issued April 3, 1968 (Tr. 3728), rehearing denied, May 24, 1968 (Tr. 3821).

[3] By merger effective July 16, 1965, Union became successor in interest to The Pure Oil Company (Pure). Union had no relationship to the factual situation involved in the present case until its merger with Pure. For the convenience of the Court, with respect to transactions occurring before July 16, 1965, reference will be made to Pure. With respect to transactions occurring after July 16, 1965, or to the present obligations of the parties, reference will be made to Union. In terms of the legal consequences involved in the present case Union and Pure may be considered synonomous.

returns to Union limited amounts of condensate and delivers the remaining gas to Union's purchaser, Tennessee Gas Pipeline Company, a division of Tenneco, Inc. (Tennessee). From 1957 to May, 1966, Jupiter performed these services for approximately 3.4¢ per Mcf under a contract which made no attempt to allocate the payments between (1) transporting gas to Tennessee and (2) transporting Unions condensate and heavy hydrocarbons and separating and storing Union's condensate. Prior to 1962, Union's contract and filed effective rate for sale to Tennessee contained no provision for reimbursement by Tennessee of payments made by Union for transportation or other services related to Union's production. In 1962, pursuant to a settlement agreement with the Commission, Union and Tennessee amended their contract to provide for (1) a base rate and (2) an additional rate per Mcf for reimbursement to Union of the charges Union pays Jupiter. Pursuant to the settlement agreement and the Union-Tennessee contract, from 1962 to May, 1966, Tennessee paid Union an amount equivalent to the entire amount that Union paid Jupiter. Thus Tennessee was paying, in consideration for the gas it received, for (1) a base rate; and (2) the same rate per Mcf that Jupiter charges Union for transporting both the gas sold to Tennessee and limited amounts of liquifiable hydrocarbons and condensate. This arrangement was not at all unusual —in practically all offshore natural gas sales where the seller does not sell the condensate the purchaser incurs, for the seller, the transportation and separation costs relating to condensate and transportation costs relating to the heavier hydrocarbons.

Ignoring Tennessee's and Union's actual interpretation of the Union-Tennessee contract and the settlement agreement and the common industry practice, the Commission held, without benefit of hearing, that Tennessee is obligated

to pay only that amount paid by Union to Jupiter for the transportation of the gas that Tennessee received. The primary basis for the Commission's decision was that

> "It would be a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting on shore that part of the gas stream which Tennessee does not receive, but which is, instead, returned by the transporter to the producer." (Tr. 3739)

On this appeal Union seeks to set aside the order under review insofar as the order denies Union its right to receive from Tennessee an amount per Mcf equal to the charge per Mcf of Jupiter for services relating to Union's production.

B. Statement of the Facts

1. *Union's Operations*

Union, as successor in interest to The Pure Oil Company (Pure) by merger effective July 16, 1965, is presently engaged in the production of natural gas and gas condensate liquids in the Rollover Field which is located in the Gulf of Mexico approximately ten miles offshore from Vermillion Parish, Louisiana.

Since 1950 the natural gas produced by Pure in the Rollover Field has been sold to Tennessee.[4] Prior to a 1962 contract amendment discussed below, Pure's filed effective rate covering its sale to Tennessee contained no provision for reimbursement by Tennessee of payments made by Pure for transportation or other services related to Pure's production.

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[4] This contract, as amended, is on file with the Federal Power Commission as Union's FPC gas rate schedule No. 120. (formerly Pure's FPC Rate Schedule No. 40, Tr. 1752)

2. The Union-Jupiter Contract

Pursuant to a contract[5] of January 2, 1957 (to which Union succeeded as a result of its merger with Pure), Jupiter gathers the gas and gas condensate produced by Union, transports the same to the shore, separates the gas from the condensate, redelivers the condensate to Union and delivers the gas to Tennessee, operator of a major natural gas pipeline system. The Union-Jupiter "Hydrocarbon Gathering and Separating Agreement" makes no attempt to allocate the payment to be made to Jupiter between (1) transporting natural gas to Tennessee, and (2) transporting, separating, and storing Union's condensate and liquifiable hydrocarbons. Instead, the agreement provides for payments to be made as follows:

> "Section 7. Compensation. The compensation to be paid by Pure to [Jupiter] for the services of [Jupiter] in gathering the gas and condensate subject to this agreement and separating condensate from the gas at [Jupiter's] plant, and for performing all other services provided for hereunder exclusive of compression, shall be as follows:
>
> "As used herein the words 'excess gas' shall mean the quantities of gas gathered hereunder in excess of the first 62,500 Mcf of gas per day.
>
> "(a) For the first 62,500 Mcf of gas per day, whether received from dedicated leases in fields now connected to [Jupiter's] gathering system or new fields hereafter connected—four cents (4¢) per Mcf.
>
> "(b) For all excess gas received from dedicated leases in fields now connected to [Jupiter's] gathering system—three cents (3¢) per Mcf." (Tr. 1693-94)

The composite rate under contract averaged approximately 3.4¢ per Mcf.

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[5] This contract, generally referred to as "Hydrocarbon Gathering and Separating Agreement," is on file with the Commission as Jupiter's FPC Rate Schedule No. 7. (Tr. 1670-1774)

The agreement provides that the volumes of gas to which the rates are applicable are determined after removal of the condensate (Tr. 1692, 1694). Thus, while the rates per Mcf are in consideration for all of the services rendered by Jupiter, the rate is applied only to the volume after removal of the condensate.

Because the present controversy concerns payment for the transportation and separation of condensate and the transportation of liquifiable hydrocarbons it is important to recognize the significance of this service relative to the transportation of the gas bought by Tennessee. The Commission's order erroneously states that about 5% of the gas stream is made up of condensate and liquifiable hydrocarbons (Tr. 3735-36) The record in the Jupiter proceeding reveals that one-half of one percent (0.5%) of the gas stream received by Jupiter constitutes condensate and only about 1.0% of the stream is made up of liquifiable hydrocarbons. (Tr. 1236) Thus the services rendered by Jupiter relating to condensate and liquifiable hydrocarbons represent only a very small portion of the services rendered by Jupiter with respect to Union's production.

3. The Pure Settlement Agreement

Under section 4 of the Natural Gas Act, 15 U.S.C. § 717c, the Commission may initiate a hearing and investigate the lawfulness of any changes in the rate, charges, rule, regulations, or practice contained in a contract filed with the Commission. The Commission may suspend the newly filed rate for as long as five months. If its investigative proceeding is not completed after the suspension period expires the proposed rate shall go into effect subject, however, to refund. If the Commission finds that any such rate, etc., is unjust, unreasonable, discriminatory, or preferential,

the Commission shall determine the just and reasonable rate, etc., to be thereafter observed and order refunds. In 1958, Pure filed a rate increase applicable to its sale to Tennesseee which was suspended by the Commission and thereafter placed in effect subject to refund (Tr. at 1270).

Seeking to terminate the refund liabilities, Pure filed a settlement proposal with the Commission. The proceedings were concluded by a settlement agreement of November 27, 1962, that covered *inter alia*, the sale of Rollover gas to Tennessee.[6] The settlement agreement required a refund and a reduction of the total rate. Additionally, it split the total rate into two parts: (1) a base rate per Mcf; and (2) a rate per Mcf that is identical to the rate per Mcf Union pays Jupiter.[7]

4. The Pure-Tennessee Contract Amendment

The Pure-Commission settlement agreement partially abrogated the Pure-Tennessee contract. In compliance with the agreement, and the Commission's express condition contained in its order approving the Pure settlement, on December 18, 1962, Pure and Tennessee amended their contract.[8] The amended contract provided for (1) a base rate per Mcf for the gas, and (2) a rate per Mcf that is identical to the rate per Mcf Union pays Jupiter.[9]

Contrary to the apparent assumption of the Commission that Union argues that Tennessee's payment should be

[6] Docket Nos. G-16790, et al. (Tr. 2611)

[7] The relevant terms of the Pure settlement proposal and the Commission's order thereon are set forth at 17-20 *infra* in connection with Union's position that the Commission's interpretation of the settlement agreement is erroneous.

[8] Supplement 9 to Union's FPC gas rate schedule No. 120 (R. 1980).

[9] The relevant terms of the Pure-Tennessee contract amendment are set forth at 15-16 *infra* in connection with Union's position that the Commission interpretation of the contract is erroneous.

based on Union's entire production, it is clear from the contract that Tennessee's payment is actually based on the volumes delivered to it after removal of the condensate and heavier hydrocarbons.

Pursuant to the amended contract from 1962 until the beginning of the present controversy in 1966, Tennessee reimbursed Pure and Union at the same rate per Mcf paid to Jupiter under the Pure-Jupiter Hydrocarbon Gathering and Separating Agreement.

3. *The Jupiter Rate Settlement*

Pursuant to section 5 of the Natural Gas Act, 15 U.S.C. § 717(d), in December 1962 the Commission instituted an investigation of the lawfulness of the rates charged by Jupiter under, *inter alia*, the Jupiter-Pure Hydrocarbon Gathering and Separating Agreement. After protracted and exhaustive administrative proceedings, on January 5, 1966, the Presiding Examiner issued an initial decision with respect to Jupiter's rate and concluded that in the future Jupiter's total rate under the Pure-Jupiter contract should be .632¢ per Mcf rather than the contractual rates of approximately 3.4¢ per Mcf. (Tr. 3126, 3164) It is noteworthy that the examiner's decision and rate ordered pursuant thereto was based upon cost-of-service considerations in which no allocation of costs were made between the services related to transporting gas to Tennessee and services relating to separation and redelivery of condensate to Union.

Subsequent to the Presiding Examiner's initial decision, while the matter was pending on appeal to the Commission, Jupiter filed an offer of settlement which was later amended (Tr. 3336) In its amended offer of settlement Jupiter agreed that it would "file a proposed rate schedule providing for a charge of 1.0¢ per Mcf (at 15.25 psia) for

transporting gas for Union . . ." (Tr. 3371) Additionally, Jupiter purported to reserve the right to collect compensation from Union "for services Jupiter performs in transporting, separating, or storing [Union's] condensate and liquifiable hydrocarbons." (Tr. 3373)

The Commission's order (Tr. 3405) of June 28, 1966, approving the Jupiter rate settlement refused to approve Jupiter's reservation of rights with respect to the collection from Union of compensation for transporting, separating, and storing condensate and liquifiable hydrocarbons. The Commission thus stated:

> "Jupiter's reservatoin of claimed rights with respect to the collection from Union . . . of compensation for transporting, separating, and storing . . . [Union's] . . . condensates and liquifiable hydrocarbons and the producers answers on this point does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with . . . [Union] . . . for those services will be acted upon if and when they are appropriately submitted to this Commission. (Tr. 3410)

In an application for rehearing of the order approving Jupiter's rate settlement, other companies situated similarly to Union but who were parties to the Jupiter proceeding questioned the meaning of the Commission's order dealing with Jupiter's reservations of claimed rights. In response to this application, the Commission issued an order (Tr. 3430) clarifying its prior order and denying rehearing, and stated as follows:

> "Phillips-Kerr-McGee state that the quoted sentence seems to imply that there are contractual 'arrangements' between Jupiter and the producers (Phillips-Kerr-McGee and Union Oil Company of California) which remain open for negotiation. They contend that if that is implied, the Commission has erred because

> the firm contractual arrangement entered into by the parties with respect to such transportation is still in force.
>
> "The quoted sentence neither implies that further contractual arrangements are open for negotiation nor requires that further negotiations be held. That sentence merely indicates that *we are not* now determining the claimed rights of any party on this matter. Accordingly, it is our view that the Phillips-Kerr-McGee request that we strike the quoted sentence from our order should be denied."

These statements by the Commission place beyond question the fact that the Commission's order approving the Jupiter rate settlement did not dispose of the questions involved in the proceedings under review. The Commission did not determine whether Jupiter was entitled to receive from Union an amount in excess of 1¢ per Mcf for all of its services and, in fact, expressly refused to consider this question. Likewise, as will be discussed, although, the decrease in Jupiter's rate was integrally related to the Union-Tennessee arrangement, the Commission's order did not purport to affect the terms of the Union-Tennessee arrangement.

6. *The Present Case*

After its rate settlement, Jupiter sought to invoice Union by separate invoices at 1¢ per Mcf for the transportation of gas to Tennessee and approximately 2.4¢ per Mcf for other services. These invoices were rejected by Union on the ground that the Union-Jupiter contract provides for the payment of a single rate for all services rather than dual rates, one for gas and another for condensate. In light of the Jupiter-Commission settlement agreement terminating the Jupiter rate investigation, Union offered to amend the contract to pro-

vide a total of 1¢ per Mcf but Jupiter rejected this offer. Thereafter, Jupiter invoiced Union at a single contract rate of approximately 3.4¢ per Mcf which Union paid during the months of October, 1966, through March, 1967.

Pursuant to its contract with Tennessee, Union invoiced Tennessee for the base price of 16.75¢ per Mcf plus the rate per Mcf paid by Union to Jupiter, approximately 3.4¢ per Mcf. Initially, Tennessee paid the invoiced amount. but shortly thereafter declined to pay more than 16.75¢ per Mcf and contended that Jupiter's charge for which Tennessee was to reimburse Union should have been only 1¢ per Mcf. In light of Tennessee's position, Union suspended all payments to Jupiter and no payments have been made since April 1967. On June 1, 1967, Tennessee initiated the proceedings under review by filing a complaint with the Federal Power Commission seeking resolution of this dispute.

After Tennessee initiated Commission proceedings, Jupiter brought suit against Union in the United States District Court for the Northern District of Illinois. In this action Jupiter is seeking a determination that the Jupiter rate investigation and settlement did not affect the amount owed Jupiter by Union and that the proper rate for all of its services it performs under its contract with Union is 3.4¢ per Mcf. Jupiter's position thus ignores (1) the fact that the Commission settlement abrogated its contract with Union and (2) the fact that the condensate is, as a product, worth only a small fraction of the amount to which Jupiter claims it is entitled for transporting and separating it. Although Union strongly opposed Jupiter's right to collect anything for transporting and separating the condensate, because of its arrangements with Tennessee, Union impled Tennessee as a third party defendant. Tennessee, supported by Union, moved the district court

to stay judicial proceedings on the ground that the Federal Power Commission has primary jurisdiction over the subject matter of the controversy. The district court issued an order staying all further court proceedings pending a resolution of the matters raised before the Commission. On October 18, 1967, Union requested the Commission to schedule hearings in the proceedings under review (Tr. 3646). However, on April 3, 1968, without benefit of hearing, the Commission issued its order now under review. By its order, the Commission held:

(1) That the authorized rate for the transportation service Jupiter performs in bringing the gas Union has sold to Tennessee to the Tennessee main line is 1.0¢ per Mcf.

(2) That under the Pure-Commission settlement agreement Union may not charge Tennessee (a) a base rate per Mcf, plus (b) the same rate per Mcf the Jupiter charges Union for its services. This conclusion was predicated on the Commission's determination that the terms of the Pure settlement agreement do not require or suggest a construction under which Tennessee would agree to pay for the cost of transporting part of the gas stream which it does not receive, and because such an arrangement would be "most peculiar."[10]

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[10] The Commission also held:

(1) That any obligation that Union might have to pay Jupiter an amount in addition to the 1¢ per Mcf for the transportation of the gas sold by Union and delivered by Jupiter to Tennessee was a "contractual issue," unrelated to the price that Union may charge Tennessee as a part of its filed rate, and must be determined in the pending judicial proceedings; and (2) that Jupiter's right, if any, to payment for transportation or other services relating to the part of the gas stream that is not delivered to Tennessee, will involve (a) jurisdictional transportation subject to certification and rate regulation by the Commission; and (b) non-jurisdictional services. Accordingly, in any judicial determination of Jupiter's entitlement, if any, to reimbursement as a matter of private contract law, the court should segregate amounts attributable to jurisdictional activities from amounts due for non-jurisdictional services.

ARGUMENT

I

THE COMMISSION ERRED IN HOLDING THAT TENNESSEE WAS TO PAY UNION ONLY THAT AMOUNT UNION PAYS JUPITER WHICH IS DIRECTLY ATTRIBUTABLE TO THE TRANSPORTATION OF GAS WHICH TENNESSEE BUYS FROM UNION AND WHICH IS TRANSPORTED BY JUPITER

For over four years after the Pure settlement agreement and the related Commission prescribed Pure-Tennessee contract amendment, Tennessee paid Union, in addition to the base rate, the same rate per Mcf that Union paid Jupiter. Furthermore, it is common practice, especially with regard to production off the shore of Louisiana, for the natural gas pipe line company gas purchaser to transport, without charge, the condensates and liquifiable hydrocarbons. Nevertheless, in the proceedings under review, the Commission held that "It would be *a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting on shore that part of the gas stream which Tennessee does not receive, but which is instead returned by the transporter to the producer.*" (Tr. 3737) Thus the Commission found that such an arrangement could not be found in the Pure settlement agreement. An examination of the controlling agreements, taken together with the construction of these agreements by the parties and viewing them in light of the industry practice reveals that the Commission was in error.

A. The Pure Tennessee Contract Amendment

In its attempt to determine Tennessee's obligation to pay Union, the Commission indicated that it might have

been considering the Pure-Tennessee contract amendment as well as the Pure rate settlement. The Commission's decision, however, appears to be based solely on the Pure settlement agreement. No attempt was made to analyze the Pure-Tennessee contract amendment or to consider its independent legal significance. As will be discussed below, the Commission's interpretation of the Pure settlement agreement was erroneous. Under the filed rate doctrine, however, without regard to the Pure settlement agreement, the Pure-Tennessee contract amendment should govern Tennessee's obligation to pay Union.

(1) The filed rate doctrine.

Under section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c, Union's rate under the Pure-Tennessee contract amendment became effective by the Commission's acceptance of the amended contract for filing.[11] Under the "filed rate doctrine" the effective rate on file with the Commission is "the only rate that may be charged or collected for the sale of natural gas in interstate commerce." *Phillips Petroleum Co. v. Ashland Oil & Refining Co.*, Docket No. RI68-228, 6 (Order on Petition for Declaratory Order September 3, 1968). As stated by the Supreme Court in *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 251 (1951) "[Petitioner] can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, and not even a court can authorize commerce on other terms." See *Hope Nat'l Gas Co. v. FPC,* 134 F.2d 287, *reversed on other grounds*, 320 U.S. 591 (1944); *Socony Mobil Oil Co. v. Brooklyn Union Gas Co.,* 299 F.2d 692, 694 (5th Cir. 1962); *cert. den'd,* 371 U.S. 877 (1962); *Mississippi River*

[11] The contract amendment is on file with the Commission as Supplement No. 9 to Union's FPC gas rate schedule No. 120 (Tr. 1980).

Fuel Corp. v. *FPC*, 202 F.2d 899, 903-04 (3d Cir. 1953); *Trunkline Gas Co.* v. *Superior Oil Co.*, 31 FPC 506.

Thus under the filed-rate doctrine the effective rate on file with the Commission — the rate reflected in the Pure-Tennessee contract amendment — is the only rate that may be charged or collected by Union until such time as the Commission, addressing itself to the specific rate in an appropriate proceeding, orders that it be prospectively changed under section 5 of the Natural Gas Act. Accordingly, in ascertaining Tennessee's obligation to pay Union it is appropriate to look solely to the terms of the filed rate.

(2) The terms of Contract Amendment and Union's filed rate.

The Pure settlement agreement partially abrogated the Pure-Tennessee contract. In order to comply with the condition of the Commission order approving the Pure settlement and in order to reflect the changes in Pure's agreement with Tennessee as proposed in its settlement, on December 18, 1962, Pure and Tennessee amended their contract. The portion of the amendment relating to price provides:

> "(2) The first paragraph of Section 11 (Schedule of Prices) is hereby deleted in its entirety and there is hereby substituted in lieu and in place thereof the following:
>
> "The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder shall be the sum of (a) and (b) below:
>
> "(a) From the date of Federal Power Commission authorization to November 1, 1966: 16.75¢ per Mcf From November 1, 1966, to November 1, 1970: 17.75¢ per Mcf From November 1, 1970, to date of expiration of this Contract: 18.75¢ per Mcf

"(b) The average payment in cents per Mcf paid to the Jupiter Corporation by The Pure Oil Company for gas transported, which shall be determined monthly by dividing the *total payment* made by The Pure Oil Company to The Jupiter Corporation by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4¢) per Mcf for the first sixty-two thousand, five hundred (62,500) Mcf per day and three cents (3¢) per Mcf on additional volumes. (Emphasis supplied.) (Tr. 1980)

This provision necessarily contemplates Tennessee's reimbursement of Union at the rate per Mcf that Union pays to Jupiter. Under the amendment, Tennessee is to pay Union, in addition to the base rate set forth in subparagraph (a), an additional rate per Mcf on the volume of gas purchased by Tennessee. This amount is the "average payment" in cents per Mcf paid to Jupiter by Pure. It is determined by dividing the total payment made by Union by the total gas volume on which the payment is based. This total gas volume is the volume that is used for the calculations under the Jupiter-Union contract, and as previously discussed, is determined after the removal of the condensate. The division calculation results in a sum per Mcf, which is by definition, the same sum per Mcf as that Union pays Jupiter. This amount is multiplied by the volume of gas purchased by Tennessee. This volume does not include the condensate and liquifiable hydrocarbons.

There is absolutely no basis for arguing that Tennessee did not agree to pay Union the same rate per Mcf that Union pays Jupiter. The volume of condensate and liquifiable hydrocarbons is insignificant and there is absolutely no breakdown of the rate Jupiter charged for its several services. Thus by necessity, Tennessee and Pure used the

single rate that was applicable under the Jupiter-Pure contract. Accordingly, as long as this contract is the basis for Union's filed effective rate, Tennessee is obligated to reimburse Union at the same rate per Mcf that is correctly paid by Union to Jupiter.

B. The Pure Settlement Agreement

The Commission appears to have relied exclusively on its interpretation of the Pure rate settlement agreement. No consideration was given the specific terms of the Pure-Tennessee contract amendment and no attempt was made to analyze its independent legal significance. Without regard, however, to the Pure-Tennessee contract amendment and Union's filed rate, the Commission erred in its interpretation of the Pure settlement agreement.

The Commission's order under review was not a substantive order on the basis of any provision in the Natural Gas Act. Instead, the order is merely what the Commission perceives as the proper interpretation of the Pure settlement agreement. Thus the fundamental principles of contract interpretation are applicable to the Pure settlement contract as well as to the Pure-Tennessee contract amendment. *Texas Eastern Trans. Corp.* v. *FPC*. 306 F.2d 345 (5th Cir. 1962), *cert den'd.* 375 U.S. 941 (1963). The documents relevant to the Pure settlement agreement consist of Pure's settlement proposal and the Commission's order approving the settlement proposal.

1. The Pure Settlement Proposal.

Prior to the Pure settlement agreement, Pure's effective filed rate to Tennessee was 21.33¢ per Mcf and made no provision for reimbursement by Tennessee of payments made by Pure for transportation or other services relating to Union's production. Seeking to terminate section 4(e)

proceedings and its refund liabilities, Pure filed a settlement proposal with the Commission in which it proposed the following:

(1) The "Petition for Approval of Settlement Proposal," reads as follows:

"The price proposed for this sale is 16.75¢ per Mcf (15.025 psia) *plus charges actually paid by Pure to Jupiter Oil Corporation.*" (Emphasis supplied.) (Tr. 2341)

(2) Exhibit "A" to "Settlement Proposal," page 6 of 7, contains the following footnote:

"9 Jupiter Oil Corporation charges Pure for transportation from the field (10 miles offshore) to Tennessee Gas Transmission Company main line on shore. The charges are 4.0¢ per Mcf (16.7 psia) for the first 62.5 MMCFD and 3.0¢ per Mcf (16.7 psia) for the remainder. *These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter,* its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure." (Emphasis supplied.) (Tr. 2555)

(3) In "Motion to Amend Petition for Approval of Settlement Proposal," at pages (2) and (3):

"The changes in Pure's proposal relate . . . to the details of the proposal as it affects Pure's Rate Schedule 40. . . . Generally they are designed to accomplish the following:

* * *

"4. Amend the provisions covering Pure's sale of the Rollover gas so as to provide a base price of 16.75¢ per Mcf (15.025 psia) *plus reimbursement for actual payments by Pure to Jupiter for transportation.* . . . Pure has been advised by the purchaser, Tennessee Gas Transmission Company, that it will execute a contract amendment to effect these changes,

and that it affirmatively supports and recommends the acceptance of the same." (Emphasis supplied.) (Tr. 2580-81)

(4) In "Amendment to Settlement Proposal," Section IV, pages (6) and (7):

"As to the sale under Rate Schedule 40, Pure proposes to file a contract amendment which will provide for:

"1. A base price of 16.75¢ per Mcf at 15.025 psia, *plus reimbursement of the actual payments Pure makes to Jupiter Oil Corporation for transportation.*" (Emphasis supplied.) (Tr. 2589-90)

2. The Commission's Order.

The Commission's November 27, 1962, order approving the Pure rate settlement proposal included a summary of Pure's settlement proposal in which the following reference was made to Pure's right of reimbursement of the charges that it paid to Jupiter.

"It proposes a settlement rate of 16.75¢ per Mcf plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount that it actually has to pay for transportation of the gas on shore, and to make any necessary filing in the future to reflect any change that may be made therein." (Tr. 2613)

After summarizing the Pure proposal, the Commission stated that the settlement was approved and made effective subject to the following terms and conditions:

"(B) The settlement rates set out in Appendix A hereto are approved and shall be effective as of November 1, 1962, and all rates and charges which exceed these rates are hereby disallowed." (Tr. 2515)

Appendix A to the Commission's order provided that with respect to the gas sold by Pure to Tennessee the proposed settlement price would be 16.75¢ plus cost of transportation. (Tr. 2518) Footnote 9 to the Commission's Appendix states:

> "Jupiter Oil Corporation charges Pure for transportation from the field (ten miles offshore) to Tennessee Gas Transmission Company mainline on shore. The charges are 4.0¢ per Mcf (16.7 psia) for the first 62.5 MMCFD and 3.0¢ per Mcf (16.7 psia) for the remainder. These charges to be recouped from Tennessee as a part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure." (Tr. 2521)

3. Proper Interpretation of the Pure Settlement Agreement.

Careful selecting for quotation only one of the numerous references in several instruments to the portion of Union's rate that relates to Jupiter's charges to Union, the Commission stated:

> "And while neither the original contract under which Pure sold gas to Tennessee, its rate settlement agreement, which has been submitted for the Commission's approval, or the appendix to the Commission's order, in terms, expressly characterizes the transportation involved as the transportation of gas actually delivered to Tennessee, there is nothing in the language utilized which requires or suggests any other construction. It would be *a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting on shore that part of the gas stream which Tennessee does not receive, but which is instead, returned by the transporter to the producer.* No such obligation can be spelled out, or even implied, from the orders or underlying contracts in issue here." (Tr. 3736-37)

A fair examination of the provisions quoted above demonstrates that the Commission was in error. Pure's settlement proposal referred to "charges actually paid by Pure to Jupiter." Subsequently, after describing the 4.0¢ per Mcf and 3.0¢ Mcf rates charged by Jupiter (a composite rate of 3.4¢ per Mcf) the settlement proposal states: "*These* charges to be recouped from Tennessee as a part of the rate will be only those actually paid by Pure to Jupiter." (Emphasis added.) It is clear that the language means that Tennessee will reimburse Pure at the same rate that Pure paid Jupiter. Additionally, the settlement proposal referred to "reimbursement for actual payments made by Pure to Jupiter for transportation." It may be argued that this reference which is limited to transportation indicates that Tennessee is not to pay the full amount of the Jupiter charges but only those relating to transportation. This possibility is, however, rendered less likely when it is recognized that the non-transportation service, *i.e.*, separation of the condensate, represents only a very small fraction of the total services performed by Jupiter. The insignificant amount of the charge attributable to non-transportation services certainly justifies characterizing the total charge as being for "transportation." Thus these references to "transportation" are unquestionably alluding to all of the services performed by Jupiter. For example, in the initial decision of the Presiding Examiner in the Jupiter rate proceeding, the Examiner described Jupiter's contract with Pure as follows:

> "Jupiter's contract is with the producer (Pure), not with Tennessee, and Jupiter's function is to transport the product of the wells and collect a fee, averaging 3.4¢ per Mcf for so doing." (Tr. 3132)

Similiarly, the Commission's order approving the Pure settlement referred to the charges made by Jupiter to

Pure "for transportation" as being 4¢ per Mcf and 3.0¢ per Mcf (Tr. 2621).

The Commission's order also expressly refers to the 4.0¢ per Mcf and 3.0¢ per Mcf rates (a composite 3.4¢ per Mcf rate) and states:

> "These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter. . . . Any reduction in charges by Jupiter would thus reduce payments by Tennessee to Pure." (Tr. 2621)

Certainly, this language demonstrates that it was intended that Tennessee would reimburse Pure in full for Pure's payments to Jupiter.

Absent very strong evidence to the contrary, the terms of these instruments should be construed as requiring Tennessee to reimburse Union at the same rate per Mcf that Jupiter charges Union. Perhaps the Commission found strong evidence to the contrary in its conclusion that such an arrangement would be "most peculiar." As discussed below, the Commmission's conclusion that such a transaction is "most peculiar" is totally incorrect.[12] Thus if consideration is confined to the terms of the relevant instruments it is necessary to conclude that Tennessee is obligated to pay Union at the same rate per Mcf that Union pays Jupiter.

4. Reference to "Transportation" and the Inconsistency of the Commission's Holdings.

The best argument that can be made in opposition to Union's position is to rely only upon the language that refers to "transportation" by Jupiter and that makes no

[12] See discussion § C at 24 *infra* and § D at 25 *infra*.

reference to the other services for which Jupiter is compensated. The response to this argument, however, is threefold. First, to persuasively make this argument it is necessary to incorrectly ignore numerous references to the charges of Jupiter being passed on to Tennessee.

Second, the portion of Jupiter's rate attributable to non-transportation services is practically de minimus. Non-transportation services involve mere mechanical separation, which is very inexpensive, and similarly inexpensive storage of condensate in tanks owned by Union on land in a swamp owned by Jupiter. The insignificant amount of the charge attributable to non-transportation services clearly justified characterizing all of the charge as being for transportation. The several references to the charges for transportation being 4¢ per Mcf for the first 62,500 Mcf per day and 3¢ on additional volumes demonstrates that the term was used to comprehend all Jupiter services.

Third, even if the "transportation" language is emphasized and the above ignored, the Commission held that Union is not able to charge Tennessee for amounts that are attributable to transportation of condensate and liquid hydrocarbons that are not sold to Tenessee. Thus the Commission construed "transportation" by Jupiter to mean not simply transportation but transportation of the gas sold to Tennessee and not condensate and liquid hydrocarbons. This holding is basically inconsistent with the Commission's holding concerning its jurisdiction over the transportation of the condensate and liquid hydrocarbons. There the Commission held that "condensate is a part of the raw natural gas emerging at the wellhead, and is part of the raw gas stream as transported." Further, the Commission stated that Jupiter's "attempt to distinguish between the transportation of condensate and that of the remainder of the gas stream, is, in reality, solely an exercise in seman-

ties." (Tr. 3822) Nevertheless, the Commission eagerly engaged in an exercise of semantics when it determined that Union was not entitled to reimbursement by Tennessee for the transportation of condensate. The Commission ignored its jurisdictional holding and concluded that the use of the term "transportation" in the Pure settlement agreement necessarily referred to transportation only of the gas delivered to Tennessee. There is absolutely no justification for this conclusion.

C. The Parties Construction of the Commission's Pure Rate Settlement Order and the Union-Tennessee Contract Amendment.

It is well settled that in interpreting contracts the courts will place great weight on the parties' practical interpretation and construction of the contract. *E.g.*, 4 Williston, Contracts § 623 (3d ed. Jaeger 1961); 3 Corbin, Contracts, § 558 (1960). Thus, Restatement, Contracts § 235 (e) (1932) provides:

> "If the conduct of the party subsequent to a manifestation of intention indicates that all the parties placed a particular interpretation upon it, that meaning is adopted if a reasonable person could attach it to the manifestation."

The parties' practical interpretation is, according to the Ninth Circuit "the strongest evidence of intent" when that construction is against one of the parties' interest. *Cutting v. Bryan*, 30 F. 2d 754 (9th Cir.), *cert. denied*, 279 U.S. 860 (1929).

Tennessee was certainly aware of the terms of the Pure settlement offer and the Commission's order thereon when it executed its contractual amendment. For over four years subsequent to the amendment, and until the present controversy, Tennessee paid Pure and Union the same amount

per Mcf that Jupiter billed Pure and Union. There was never any question concerning Tennessee's obligation. Substantial sums of money paid by Tennessee over an extended peroid of time demonstrates that it construed the Pure settlement agreement and its own contract amendment with Pure as requiring it to pay Union the same amount per Mcf that Jupiter charges Union.

Finally, and without regard to the weight to be given the parties' construction of the contract, it is clear that the parties' construction of these instruments belies the basis of the Commission's decision — that such an arrangement would be "most peculiar."

D. Industry Practice

An independent basis for construction of the agreements involved is the prevailing industry practice. It is well established that custom and usage may be highly influential in interpreting contracts. *E.g.*, 3 Williston §§ 648-62 (1936); *Edward W. Morgan Co.* v. *United States*, 230 F. 2d 896 (5th Cir.), *cert. denied*, 351 U.S. 965 (1956). Indeed, the Commission recognized the relevance of this factor and relied heavily on the factual assumption that it would be "most peculiar" for Tennessee to bear the cost of the transportation and separation of condensate. In fact, it is most common for a pipeline gas purchaser, without reimbursement, to transport and separate condensate and transport liquifiable hydrocarbons.

The Commission's conclusion that transportation and separation of condensate without reimbursement by Tennessee would be most peculiar, totally ignores the subject of its own investigation in Docket No. R-338 "Transportation of Liquids, Liquifiable Hydrocarbons, etc. — Allocable Pipeline Costs; Statement of General Policy" (February 5, 1968); 18 CFR § 2.65 (Proposed). In Docket No.

R-338 the Commission has proposed to amend its regulations to provide that the Commission will, under certain circumstances, allocate an appropriate portion of the transportation costs relating to liquifiable hydrocarbons regardless of whether the pipeline has separately charged therefor. With regard to the frequency of the practice which the Commission categorized in the proceedings under review as "most peculiar" the Commission stated in its Proposed Statement of General Policy that "transactions of this type may occur often, especially with regard to production off the shore of Louisiana."

E. Pure Was Intended To Serve As A Mere Conduit Between Jupiter and Tennessee.

The terms of the Pure settlement, Pure's contract amendment with Tennessee, the Jupiter rate settlement, and the Federal Power Commission's regulatory scheme all coalesce to show that Pure was intended to serve as a mere conduit between Jupiter and Tennessee. Under the Pure rate settlement, "any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure." (Tr. 2621) Thus any part of the rate charged Pure by Jupiter, whether relating to the transportation or separation of condensate or to the gas sold to Tennessee, was to be borne by Tennessee. The relationship between the Jupiter settlement and the Pure rate settlement, Tennessee's contract with Pure, and the Commission's regulatory scheme, was discussed by the Presiding Examiner in his initial decision in the Jupiter rate investigation. The Examiner first quoted from 28 FPC 889 at 895:

> "Jupiter Oil Corporation charges Pure for transportation from the field (10 miles offshore) to Tennessee Gas Transmission Company main line on shore. The charges are 4.0 cents per Mcf (16.7 psia) for the first 62.5 MMCFD and 3.0 cents per Mcf (16.7 psia)

for the remainder. These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure.

The Examiner thus concluded:

"Thus, since the rate increase settlement, Tennessee has paid Pure 16.75 cents plus an average of 3.4 cents, or 20.15 cents, and Pure has been paying Jupiter the 3.4-cent transportation charge and retaining the balance. Hereafter, when Jupiter's rate changes on the effective date of the order below, Tennessee's cost will be affected accordingly, see Chapter IX below." (Tr. 3137)

Subsequently, in his opinion, the Examiner elaborated on Pure's function as a conduit between Jupiter and Tennessee:

"While Pure is not a party here, and may not be aware of this proceeding, its undertaking carried forward into the Commission's order on its rate settlement, as quoted on page 11 above it is clear and indubitable that if and when Jupiter's 3.4-cent rate reduces for any reason, the benefit will pass on to Tennessee and will necessarily affect Tennessee's cost of service and have its eventual effect on Tennessee's resale price and the consumer's costs. For completeness of the record it may be appropriate to suggest that the Secretary send a copy of the order here subjoined to the Pure Oil Company at its recorded address. Finally, it hardly seems necessary also to incorporate in the order an enjoinder that Tennessee no longer continue to pay whatever price is invoiced to it (confessedly assuming it to be correct, 6T912), but shall take care to adjust its payments according to the change in Jupiter's rate.

"This procedural refinement is essential if the result of the proceding is to benefit consumers. The point is

> the rate being altered by the attached order is Jupiter's rate to Pure, and the rate order does not change Tennessee's costs or the consumers' burden until Pure does in fact pass the rate benefit on to its customer, Tennessee. Pure's rate to Tennessee is not technically in this case, but in view of the undertaking quoted, as cited above, there is no reason to doubt that the benefit will be transferred as soon as it occurs, nor to doubt that it will create its reaction in Tennessee's cost of service and eventually in Tennessee's rates, leading to a reduction in consumers' costs." (Tr. 3172)

F. Conclusion

The Pure-Tennessee contract amendment unquestionably provides for Tennessee to pay Pure, in addition to a base rate, the same rate per Mcf per gas that Pure pays Jupiter. The Commission ignored the terms of the amendment and its order is thus inconsistent with the filed rate doctrine under which Tennessee must pay Union the amount provided in Union's filed rate. The Commission also erred in holding that the Pure rate settlement does not provide for Tennessee to reimburse Union at the same rate per Mcf that is paid by Union to Jupiter. Additionally, the Commission erred in considering influential that the interpretation argued for by Union would be "most peculiar." There is absolutely nothing in the record to support the Commission's conclusion. Instead, for four years the parties construed the agreement to require such a payment by Tennessee. Additionally, such a transaction is very common "especially with respect to production off the shore of Louisiana."

Perhaps the Commission's order is based on the fact that it does not approve of transactions by which pipeline purchasers of natural gas pay for services relating to products that they do not receive. Dissatisfaction with such

a transaction is not, however, a justification for the interpretation that the Commission has given the settlement agreement and the Pure-Tennessee contract amendment. The Commission's unwarranted interpretation of the Pure settlement agreement clearly has the undesirable effect of discouraging Power Commission settlements. As stated by the Fifth Circuit in *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345 (1962) *cert. denied*, 375 U.S. 941 1963):

> "One sure way to discourage voluntary settlements is for the Commission, at the behest of one party or the other, . . . to read into contracts things which are simply not expressed or not there, out of the thoroughly commendable (and understandable) feeling that unless it is done the result is not as good as it ought to have been." 306 F.2d at 347.

For the foregoing reasons, the Commission's decision concerning the Union-Tennessee controversy is incorrect as a matter of law. Alternatively, for the reasons set forth below, this Court should remand the proceedings to the Commission for hearing on the questions concerning Tennessee's obligation to pay Union.

II

THE COMMISSION ERRED IN REFUSING TO GRANT UNION A HEARING ON THE MATTERS INVOLVED IN THE PROCEEDINGS BELOW

On October 18, 1967, Union requested the Commission to schedule hearings in the proceedings under review. The order under review was issued without the benefit of a hearing. Had the Commission granted Union's request, Union could easily have demonstrated to the Commission the correctness of its position. First, Union could have impressed upon the Commission that, for over four years,

Tennessee had been paying the same rate per Mcf that Jupiter charged Union. In this respect Union would have introduced its records of such payments. Secondly, Union would have demonstrated that Tennessee's payment for these services performed by Jupiter for Union is most common. Third, Union would have introduced evidence that established that the cost of service rendered with respect to production of Union that is not sold to Tennessee represents only a very small portion of the total cost of the services performed by Jupiter. While the Commission stated that 5% of the gas stream of the producers is not sold to Tennessee, Union would have brought to the Commission's attention the fact that only 0.5% of the total volume is condensate and 1.0% liquifiable hydrocarbons (Tr. at 1236). Such proof would have demonstrated the ridiculous nature of Jupiter's claim that it is entitled to 2.4¢ per Mcf in addition to the 1¢ per Mcf under the Jupiter settlement. Likewise, such evidence would show that the likelihood that the parties would refer to all of the services which Jupiter performs as constituting "transportation." Fourth, if the Commission had granted a hearing, Union would have called witnesses from all parties who negotiated the Pure settlement who would have testified that the provisions in the Pure rate settlement concerning reimbursement by Tennessee were intended to convert Union into a mere conduit by which the same rate paid by Union to Jupiter for the services that it rendered would be passed on to Tennessee. Finally, if Union had been granted a hearing it would have called witnesses to testify to the intent of the parties in amending the Pure-Tennessee contract to conform with the Pure rate settlement agreement. This testimony would have substantiated what is readily apparent from the face of the Pure Tennessee contract — Tennessee is obligated to pay Union the same rate per Mcf that is paid by Union for Jupiter's services.

It is clear that Union was greatly prejudiced by the Commission's refusal to hold a hearing. The Commission's decision was predicated on the view that payment by Tennessee for the services rendered by Jupiter for Union was "highly peculiar." Not only is there absolutely nothing in the record to support this factual conclusion of the Commission, but it is clear that the Commission could not have reached this conclusion if a hearing had been held concerning the factual issues raised by the Pure rate settlement agreement and the Pure-Tennessee contract amendment.[13]

The Pure rate settlement was intended to terminate section 4(e), 15 U.S.C. § 717(d), rate proceedings in which it was claimed that Pure's rate might be unjust and unreasonable. In order to change Pure's rate it was necessary that the Commission hold a hearing or arrive at a mutually acceptable settlement. In the present case the Commission has, as a result of its order, effectively reduced Union's filed rate without the benefit of a hearing required by section 4(e), 15 U.S.C. § 717(d). Accordingly, it has failed to comply with section 5 of the Administrative Procedure Act as well as the Natural Gas Act. It is clear that the first prerequisite to an order by the Commission providing for a reduction in natural gas rates is that it shall be preceded by a hearing. *FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575 (1942).

The consequences of the Commission's failure to grant a hearing in the present case are controlled by this Court's decision in *Philadelphia Co.* v. *FPC*, 175 F.2d 808 (D.C. Cir. 1948), *dism'd as moot*, 337 U.S. 901 (1949). Holding that

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[13] The Commission's error was perhaps caused by its failure to understand that Tennessee's payments to Union are based on volumes after the removal of the condensate and liquefiable hydrocarbons.

an order of the FPC was invalid for lack of an adequate hearing the Court noted:

> "It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of Legislative or rule making action, general and future in effect. Prentis v. Atlantic Coast Line, 108, 211 U.S. 210. . . . : Louisville & Nashville R. Co. v. Garrett, 1913, 231 U.S. 298. . . . . 32 Am. Jur., Public Administrative law, §§ 38-40." 175 F. 2d at 816.

Within this definition, the Commission's order in the present case is adjudicatory as to Union. It is particular in that it applies to this proceeding alone. Moreover, it is immediate in its operation.

It governs not only the future obligations of Union and Tennessee but will, under the principles of primary jurisdiction, directly affect Union's third party action against Tennessee in the civil action filed in the United States District court for the Northern District of Illinois, Eastern Division. The adjudicatory character of the proceedings is indubitable. Furthermore, as stated by this Court in the *Philadelphia Co.* case:

> "It is elementary also in our system of law that adjudicatory law cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of all the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of due process of the Fifth Amendment of the Constitution. The applicability of this clause to the quasi-judicial proceedings of an administrative agency is recognized [citing cases]." 175 F. 2d at 817.

CONCLUSION

For the foregoing reasons Union respectfully requests that this Court reverse the order of the Commission and remand to the Commission with instructions that the Commission order Tennessee to pay Union at the same rate per Mcf that Union pays Jupiter for the transportation of Union's production and the separation of Union's condensate. Alternatively, Union requests that this Court reverse and remand to the Commission for a hearing on the subject matter of these proceedings.

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BRIEF OF PETITIONER,
THE JUPITER CORPORATION

In The

United States Court of Appeals

For The District Of Columbia Circuit

G. BURTON LIESE, Petitioner vs. FEDERAL POWER COMMISSION, Respondent PHILLIPS PETROLEUM CO., et al., Intervenors	}	No. 22,153
THE JUPITER CORPORATION, Petitioner vs. FEDERAL POWER COMMISSION, Respondent PHILLIPS PETROLEUM CO., et al., Intervenors	}	No. 22,154
UNION OIL COMPANY OF CALIFORNIA, Petitioner vs. FEDERAL POWER COMMISSION, Respondent TENNESSEE GAS PIPELINE COMPANY, et al., Intervenors	}	No. 22,442

ON PETITION TO REVIEW
FEDERAL POWER COMMISSION ORDERS

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No. 22,442

BRIEF OF PETITIONER, THE JUPITER CORPORATION

The first and most important fact in these proceedings is that, although this is an appeal from Federal Power Commission (Commission) orders, the result of these proceedings will have no effect upon the public. The rate

paid by the pipeline purchaser of the natural gas here in question determines the amount which gas consumers will pay. That rate has been set by the Commission, it is not involved herein, and nothing in this case will affect it. This is because the orders of the Commission here under review merely affect the distribution of revenues between The Jupiter Corporation (Jupiter) and two large producers of natural gas. Jupiter seeks review of such orders because they violate applicable law, contradict orders of a court of competent jurisdiction relative to these same transactions and issues, and are inconsistent with the Commission's own prior orders and with the contracts between Jupiter and the producers. In short, the Commission has intruded into a private contract action between corporations, even though that dispute does not affect the public interest (because no issue is raised by Jupiter in these proceedings as to the proper rates which the consumer is or will be required to pay for natural gas, and the Commission's orders complained of have no effect on those rates). Under these circumstances, the scope of judicial review is broad, and deference to Commission "expertise" is unnecessary and unwarranted. (See Section III. D, below.)

I.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The issues raised by Jupiter in this appeal* are:

1. Did the Commission err when it ordered Jupiter to *increase* the price it pays to producers of natural gas? Jupiter urges that the subject orders are in error

* This case has not previously been before this Court.

because they purport to require Jupiter to pay to producers a price for natural gas which is in excess of the price the producers are entitled to receive under their contracts with Jupiter, thus violating, *inter alia, United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956). Those orders also attempt to reduce Jupiter's total revenues to a level applicable to only the *jurisdictional* services performed by Jupiter for the producers, when in the same orders the Commission recognized that, under the same contracts between the companies, Jupiter renders additional services which are not subject to Commission jurisdiction. This error is compounded because the Commission also recognized, in the subject orders, that the level of Jupiter's proper contractual charge, if any, for such *non-jurisdictional* services must be determined by a court of competent jurisdiction, and that such issue is now pending in such a court, in Cook County, Illinois. Such court has refused to order Jupiter to increase the price it pays (and decrease its revenues) by escrow, pending trial. (Section III. A hereof).

2. Did the Commission exceed its authority when it ordered the pipeline company which is contractually required to purchase gas from Jupiter to stop paying Jupiter for such gas and to begin paying the producers, thus purporting to "reform" contractual relationships? (Section III. B hereof).

3. Did the Commission err when it decided it has jurisdiction over the rates which may be charged for the transportation of liquid condensate, which is not natural gas? (Section III. C hereof).

4. Is the Commission's modification of its prior orders, after the record relative thereto was filed with this Court, invalid under Section 19 (a) of the Natural Gas Act, 15 U.S.C. § 717r(a)? (Section III. D hereof).

II.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition by the Federal Power Commission

This case involves a petition by Jupiter to review Orders of the Commission. The first Order was issued April 3, 1968, and a May 24, 1968 Order denied rehearing of the April 3 Order. By Order of December 13, 1968, the Commission has further "interpreted" those earlier Orders, and also has added new "enforcement" procedures. Each of the three subject Orders was issued in Docket Nos. RI63-212, G-16790 and RI68-111. The latter docket was begun after petitions of Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee), on May 31, 1967, and Phillips Petroleum Company (Phillips) and Kerr-McGee Corporation (Kerr), two large producers of oil and natural gas, filed August 25, 1967, alleged that Jupiter had failed to comply with prior rate orders issued by the Commission. Jupiter filed answers to said petitions, but no hearings or briefs were ordered by the Commission prior to rendition of the subject Orders.

B. Statement of Facts

Jupiter believes that, in order for the Court to have an understanding of the issues involved in this appeal, the background facts leading up to the instant controversy will be helpful.

(1) Background

Jupiter is the owner and operator of a small underwater pipeline system, located offshore of Vermilion Parish, Louisiana, in the Gulf of Mexico, in what is

known as the "Rollover Field." Phillips and Kerr, as joint venturers, are producers from leasehold interests in certain underwater areas in the Rollover Field. Union Oil Company of California (Union) also is a producer in that field.

(a) The Phillips-Kerr contract

Jupiter's Rollover Field System receives natural gas and liquid condensate, produced by Phillips-Kerr, at offshore platforms. Pursuant to a 1953 contract with those companies, Jupiter transports the gas and condensate to shore, separates the condensate from the gas, dehydrates the gas, renders other services, delivers the natural gas to the pipeline purchaser, Tennessee, and redelivers or arranges the redelivery of the condensate to Phillips-Kerr. The contract provides for the sale by Phillips-Kerr to Jupiter of the natural gas, but not the liquid condensate, both of which are received, carried and delivered by Jupiter. Phillips-Kerr retains and sells the condensate privately.

The natural gas is sold by Jupiter to Tennessee pursuant to another 1953 contract. Since June 1, 1966, Jupiter has received payments from Tennessee at the rate of 19.5 cents per Mcf, pursuant to a prior order of the FPC issued June 28, 1966, in these proceedings (35 F.P.C. 1091, R. 3405 to 3410), pursuant to a settlement agreement, which order is not under review here. It is that price which controls the cost of the gas to the consumer, since Tennessee passes that amount on to its gas distributor customers, who sell to the public. Jupiter has obeyed the Commission order which set such price and plans to continue to obey it. Thus, these proceedings can have no effect upon that 19.5 cent price, or upon the public, but involve, instead, merely a private contract

dispute over how that 19.5 cents is to be divided between Jupiter and Phillips-Kerr.

The contract between Jupiter and Phillips-Kerr provides that Jupiter is to pay to Phillips-Kerr, for each Mcf, an amount equal to the price per Mcf which Jupiter receives from Tennessee, less a "spread" based on the number of Mcf transported during a given month. This contractual "spread" has averaged approximately 2.5 cents per Mcf, varying slightly, according to volumes, each month. Thus, Jupiter believes that the proper contractual price to Phillips-Kerr is approximately 17 cents per Mcf (19.5 cents less the approximately 2.5 cents spread), and Jupiter currently pays that amount. Since 1953, Phillips-Kerr's revenues have increased from 3.8¢ to 17¢. Jupiter's have not changed.

The Commission has since stated that the 19.5 cent price set in the above-mentioned Commission order of June 28, 1966 was arrived at by adding a stipulated one cent per Mcf Jupiter charge for transporting *natural gas* to 18.5 cents per Mcf. The latter figure was based upon the fact that in Commission Opinion 470, issued August 11, 1965, in *Phillips Petroleum Company, et al.*, Docket No. G-16611, et al., 34 F.P.C. 486, the Commission authorized Phillips-Kerr to sell the natural gas to Jupiter at an initial price which "shall not be *more than* 18.5 cents per Mcf" (34 F.P.C. at 490, emphasis added).

Following the Commission order of June 28, 1966, reducing the price that Jupiter could charge Tennessee to 19.5 cents, Phillips-Kerr continued to bill Jupiter at the rate of 18.5 cents per Mcf. Jupiter filed suit in the Circuit Court of Cook County, Illinois, *The Jupiter Corporation* v. *Phillips Petroleum Company and Kerr-McGee Corporation*, Case No. 67 L 12177, to establish that the correct price due to Phillips-Kerr is, and has been since June, 1966, the approximately 17 cents per Mcf

which Jupiter currently pays, as described above, and to collect overcharges paid previously.* The Circuit Court denied a motion by Phillips-Kerr to dismiss Jupiter's suit, or in the alternative to hold it in abeyance pending determination by the Commission of the question of whether the Commission had jurisdiction over the total bundle of services performed by Jupiter under the Phillips-Kerr contract with Jupiter. Thus, the suit is now on the trial calendar awaiting trial.

On February 23, 1968, that court also denied a motion by Phillips-Kerr that Jupiter be required to deposit into escrow the amounts which Jupiter has refused to pay to Phillips-Kerr and which Phillips-Kerr believes are due. It is just such amounts which the Commission has now directed Jupiter to pay to Phillips-Kerr.

(b) The Union contract

Jupiter's Rollover Field System also receives natural gas and liquid condensate produced by Union, at offshore platforms. The contract between Jupiter and Union calls for Jupiter to receive the natural gas and condensate produced by Union, transport them to shore, separate the condensate from the gas, dehydrate the gas, perform other services, deliver the natural gas to Tennessee, and redeliver or arrange the redelivery of the condensate to Union. The compensation to be paid to Jupiter by Union for these services is based, under the terms of their contract, on the number of Mcf gathered

* The Commission, as explained below, has not attempted to resolve those contractual issues, deferring to the court for such resolution, and therefore, the merits of the contractual issues between the parties are not, and cannot be, before this Court in this review proceeding. They will be decided in the Circuit Court in Illinois.

per day, and has averaged approximately 3.4 cents per Mcf. Union sells the natural gas to Tennessee pursuant to a contract between those companies and sells the condensate privately.

Following the above described Commission order of June 28, 1966, Jupiter continued billing Union for the contractual amount of approximately 3.4 cents per Mcf, including the one cent per Mcf which the Commission designated as being for the transportation of natural gas. Union, however, has not paid *any* portion of the charges due to Jupiter under such contract since March, 1967. Therefore, Jupiter filed suit against Union in the Federal District Court for the Northern District of Illinois, to require Union to comply with the terms of its contract with Jupiter. The District Court denied Union's motion to dismiss, but granted a motion to hold the case in abeyance until the Commission ruled on Union's claim that the entire bundle of services performed by Jupiter under its contract with Union was jurisdictional and subject to regulation by the Commission as to rates and charges. The merits of this contractual dispute are not involved herein.

(2) Commission action here complained of

In its April 3, 1968 Order, the Commission disclaimed any expertise or authority to resolve the contractual issues involved in the two pending judicial proceedings referred to above (R. 3735, 3738). Jupiter agrees with the Commission's disclaimer and no party has appealed that part of the Commission's Order, so that neither the merits of such "contractual issues" nor the question of the Commission's authority with regard thereto are involved herein. The Commission's Order of April 3, 1968, and the Commission's Order of December 13,

1968,* also admit that Jupiter performs non-jurisdictional services for Phillips-Kerr and Union. (R. 3736, 3738).

Despite the foregoing, and the Commission's related recognition that Jupiter's contracts with Union and Phillips-Kerr may be determined by the courts to entitle Jupiter to more than the compensation which the Commission has set as the allowed rate for the transportation of natural gas only, the Commission has ordered Jupiter to increase its payments to Phillips-Kerr, and to pay back any excess received since May, 1966 over the one cent per Mcf jurisdictional charge. Such ruling was clearly stated in the Commission's December 13, 1968 Order, and the Commission now claims that it was stated in the April 3, 1968 Order.

The Commission's Order of December 13, 1968, also directed that Tennessee must stop paying Jupiter for the gas produced by Phillips-Kerr, which Tennessee is contractually bound to buy from Jupiter, and begin paying Phillips-Kerr directly, remitting only the one cent per Mcf to Jupiter.

Finally, the Commission's April 3, 1968 Order, although agreeing that Jupiter performs non-jurisdictional services for the producers, held that the *rates* for the transportation of liquid condensate are subject to Commission jurisdiction. (Order of April 3, 1968, R. 3735, 3738, and order of May 24, 1968, R. 3823). Jupiter disagrees. (Jupiter does not contest Commission jurisdiction over the purchase and sale for resale and/or transportation of natural gas, of course, or Commission *certificate jurisdiction* over the facilities necessary to transport liquid condensate when, as here, those facilities are used primarily for the transportation of natural gas.)

* Copies of the December 13, 1968 Order have been sent to this Court by the Commission.

III.

ARGUMENT

A. The Commission's Order that Jupiter Must Pay 18.5 Cents Per Mcf to Phillips-Kerr, and Can Currently Collect Only One Cent Per Mcf from Union*, Is Inconsistent with the Commission's Own Orders, Contradicts an Order of a Court of Competent Jurisdiction, and Exceeds the Commission's Authority

(1) Introduction

As discussed in Section II. B (1) (a), above, Jupiter has paid, and is paying, to Phillips-Kerr, approximately 17 cents per Mcf, the price that is due to Jupiter pursuant to contracts between them. The Commission's Order of April 3, 1968 stated that Jupiter must pay Phillips-Kerr "the latter's prescribed certificate rate of 18.5 cents per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56, respectively." Jupiter interpreted such order to refer only to the portion of its dealings with Phillips-Kerr which relate to *natural gas*, and are subject to Commission jurisdiction. The reference to "*Gas* Rate Sched-

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* The subject Commission Orders do not clearly state that Jupiter's total collections from Union cannot exceed one cent per Mcf. However, the Commission's December 13, 1968 Order states clear Commission conclusions (erroneous conclusions, Jupiter submits) relative to the Jupiter, Phillips-Kerr transactions. If those conclusions were to be applied to the Jupiter, Union transaction (which is not discussed in the December 13, 1968 Order), the result would probably be a Commission ruling setting a one cent figure in the Union transaction too. Therefore, if the Commission is in error as to the Phillips-Kerr transactions, as discussed in this subsection A, then such a Commission ruling as to the Jupiter, Union transaction would also be invalid. Jupiter will discuss only the Phillips-Kerr situation herein.

ule" (emphasis added) strengthened this conclusion. In its December 13, 1968 Order, however, the Commission states that it means, and meant in its April 3, 1968 Order, that Jupiter must pay 18.5 cents per Mcf, irrespective of non-jurisdictional factors. Thus, the Commission has now ordered Jupiter to pay Phillips-Kerr the difference between 17 cents and 18.5 cents per Mcf, for the period since May, 1966.

It is significant, however, that, when the Commission issued its April 3, 1968 Order, Jupiter had by that time "underpaid" Phillips-Kerr ever since May, 1966, according to the theory the Commission now propounds. Yet, neither that Commission Order, nor the May 24, 1964 Order on rehearing, ordered Jupiter to pay such "underpayments" to Phillips-Kerr. In fact, the April 3, 1968 Order states that Jupiter must pay "18.5 cents (at 15.025 psia) for each Mcf of *natural gas* it purchases from" Phillips-Kerr (R. 3734, emphasis added), but then says that Jupiter claims it is entitled to offset against such 18.5 cents the amounts due to Jupiter by Phillips-Kerr for services Jupiter believes to be non-jurisdictional. The order then says that "We do not believe any public interest objective would be achieved by our attempting to resolve such contractual issues." This conveys clearly a Commission decision to leave the question of what the Commission termed an "offset" against the 18.5 cent price to be decided by the courts, and, therefore, no refund order was issued against Jupiter. This is wholly consistent with a recognition that Jupiter performs non-jurisdictional services, that its contractual right to compensation for such services is for the courts to decide and that such matter was before a court of competent jurisdiction, which had already refused to require Jupiter to escrow the "offset" amount. Yet now, in the December 13, 1968 Order, the Commis-

sion accuses Jupiter of "flouting" its April 3, 1968 Order, because Jupiter did not make that refund and continued to pay 17 cents per Mcf, after "offset."

The Commission's actions subsequent to the April 3 Order also led Jupiter to believe it was not in violation of such Order, since the Commission failed to act, within thirty days, upon two motions filed by Phillips-Kerr.* Those motions alleged that Jupiter was in violation of the April 3 Order, and the Commission's failure to act constituted a denial of those motions under Section 1.12 (e) of the Commission's Rules of Practice and Procedure. Again, in light of these facts, allegations of willful violation by Jupiter are inexplicable.

This claim that Jupiter willfully defied the Commission occurs throughout the subject Orders, however, and particularly the December 13, 1968 Order. Jupiter does not know the reason for such incorrect claims, nor for the tone of the Orders overall. Jupiter submits that they are unwarranted, as are the multiple errors and lack of logic in the Commission's rulings as to Jupiter, as explained below.

The three separate and individually sufficient reasons why the Commission cannot now require Jupiter to increase its price to Phillips-Kerr will now be set forth in the following three subsections of this Section A.

(2) The Commission's order that Jupiter make increased payments to Phillips-Kerr exceeds the Commission's jurisdiction, as shown by the Commission's own opinions herein

As discussed above, the Commission's April 3, 1968 Order (and the May 24, 1968 Order denying Rehearing) did not direct Jupiter to pay the past alleged "underpay-

* On June 27, 1968 and October 16, 1968.

ments" to Phillips-Kerr. Jupiter believes that it also did not order Jupiter to pay 18.5 cents per Mcf as a result of its *total* contractual transactions with Phillips-Kerr, since that ruling, too, would have been inconsistent with the recognition of Jupiter's non-jurisdictional services and court authority over contract actions, expressed in that April 3 Order. Thus, the December 13, 1968 Order, which does order such payments, is inconsistent with the April 3, 1968 and May 24, 1968 Orders, as will now be explained.*

The fact that the Commission recognized that Jupiter performs non-jurisdictional services for Phillips-Kerr (and Union) is clear from the May 24, 1968 Order, where the Commission stated:

> "As there noted [in the April 3 order], Jupiter is a party to two basic contracts, with Phillips-Kerr McGee and with Union, which provide for the performance of several functions by Jupiter. Leaving aside the difference in form of the contracts, which is adequately explained by the April 3 order, *these functions are both jurisdictional and non-jurisdictional.*" (Emphasis added) (R. 3822)

At page 3 of that Order (R. 3823), the Commission also refers to "the non-jurisdictional services performed," and this is consistent with references in the April 3, 1968 Order (R. 3735, 3736, 3738). Finally, even in the December 13, 1968 Order, the Commission recognizes that Jupiter performs non-jurisdictional services (see pages 2 and 3 thereof).

The Commission has also stated that Jupiter claims that it has a contractual right to compensation, "for non-jurisdictional services," over and above the one cent

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* And to the extent the April 3 order is now interpreted to require Jupiter to pay a higher rate, it is internally inconsistent.

per Mcf which the Commission has allowed for the jurisdictional transportation of gas, and additional compensation "for the transportation of liquid condensate."* The phrases in quotation marks in the preceding sentence are so designated because they represent the Commission's view of Jupiter's position. Jupiter's actual position is that it has a single, unified contract with Phillips-Kerr under which it purchases gas at a price which varies according to Jupiter's resale price. The result, under that contract, is that Jupiter has a right to retain an approximately 2.5 cents per Mcf "spread". Jupiter, in turn, performs a total bundle of services, one of which—the transportation of gas—is jurisdictional, the rest of which are not. The Commission has ruled that Jupiter must retain only one cent per Mcf for the jurisdictional transportation of natural gas, and thus regards any additional amount which Jupiter retains, over the one cent, to be for other services. This is a determination for *regulatory* purposes.**

Whether Jupiter does, in fact, have a contractual duty to pay Phillips-Kerr more than 17 cents per Mcf and retain less than the 2.5 cent amount—whether it will, in pending court litigation, be held that Jupiter cannot retain what the Commission regards as the payment for non-jurisdictional services—is not in issue in this appeal. What is directly significant is that *the Commission* has held that Jupiter's contractual right to retain more than one cent per Mcf is for a court of competent jurisdiction to decide. The Commission did this in its April 3, 1968

* The Commission believes that the rate for such condensate transportation is subject to Commission jurisdiction. Jupiter does not. See Section C, below.

** Jupiter's unified contract with Union provides for approximately 3.4 cents per Mcf for all services; the Commission has designated one cent per Mcf of that amount to be for the transportation of gas.

Order, stating, after discussing Jupiter's contractual claims against Phillips-Kerr:*

> "We do not believe any public interest objective would be achieved by our attempting to resolve such contractual issues. This is an area in which we possess no special expertise which would be applicable in any subsequent judicial proceedings. See *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960); *Pure Oil Co.* v. *F.P.C.*, 299 F.2d 370 (CA7, 1962). Moreover, in the present situation any judicial remedy available to Jupiter may well be a matter of equity rather than of law. . . .
>
> "It is recognized that, in addition to the transportation performed for the jurisdictional sales, Jupiter claims the right to payment under its contract for other services of a non-jurisdictional nature. In order to facilitate further administrative proceedings it is to be hoped, therefore, that any *judicial determination* that Jupiter is, as a matter of private obligation, entitled to any payments by Phillips-Kerr McGee would segregate any amount due for said transportation from any other obligations to Jupiter the producers may be found to have." (Emphasis added) (R. 3735, 3736)

Then, in regard to the Union transaction, the Commission held:

> "As in the case of the Phillips-Kerr-McGee transaction, we see no reason, at this time, to attempt to resolve any contractual issue which may exist between Union and Jupiter as to the latter's right to compensation for services allegedly performed for Union, with respect to that part of the gas stream Jupiter physically receives from Union but which is not purchased from Union by Tennessee. *Any such obligations are totally unrelated to the price Union may charge Tennessee as part of its filed rate*:. . . . Thus here too, we would hope and expect any *judicial*

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* As the Commission views such claims.

> *determination* of any Jupiter entitlement to reimbursement as a matter of private law would segregate the amounts attributable to such jurisdictional activities (which would then be subject to regulation by this Commission) from any amounts due for non-jurisdictional services." (Emphasis added) (R. 3738)

The foregoing makes it clear that the Commission recognizes that Jupiter performs non-jurisdictional services for Phillips-Kerr* and that Jupiter's contractual claims for compensation in addition to the one cent per Mcf jurisdictional gas charge are for the courts to rule upon. The Commission also recognized that if those contractual issues are resolved in Jupiter's favor, Jupiter will not be required to pay Phillips-Kerr more than 17 cents and may retain more than the one cent per Mcf (R. 3735). Nevertheless, the Commission's December 13, 1968 Order directs Jupiter to pay to Phillips-Kerr the "shortage" established by the extent to which Jupiter's payments, since June, 1966, have been less than 18.5 cents per Mcf (Ordering paragraph D). That Order also holds that Jupiter must begin to currently receive only one cent per Mcf, rather than its approximately 2.5 cent per Mcf contract spread, while Phillips-Kerr receives 18.5 cents, instead of its approximately 17 cent contractual charge.** (Ordering paragraphs A, B and C.)

Thus, the Commission has now held that Jupiter must forego the revenues which the Commission itself has ruled are for non-jurisdictional services.*** But by defini-

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* And Union.

** This is done by an invalid "reformation" of contracts. See Section III B below.

*** The Commission has not stated whether Jupiter has or has not a contractual right to such revenues, since that is for a court to decide, but, as noted, the Commission conceded the services are non-jurisdictional.

tion, the Commission has no authority over such revenues. In other words, since the Commission believes that Jupiter's right to retain more than 1 cent per Mcf under its contracts with Phillips-Kerr is premised on the basis of the non-jurisdictional services which Jupiter performs, it is beyond the Commission's jurisdiction to now purport to hold that Jupiter cannot collect any revenues for those non-jurisdictional services. In short, the Commission has exhausted not only its jurisdiction, but also its legitimate area of concern, when it establishes (1) that the pipeline purchaser of the gas, Tennessee (and thus the consumer), is paying no more than the Commission's established price; (2) that the rates for *jurisdictional* services by Jupiter and Phillips-Kerr are established clearly; and (3) that any controversy between the parties relative to matters outside the jurisdiction of the Commission is in the hands of a court of competent jurisdiction. Those matters have been established clearly, brought to the Commission's attention and the Commission has noted them. Therefore, there is no public interest issue involved and the Commission has neither jurisdiction nor legitimate reason to interfere with Jupiter's "non-jurisdictional" revenues.

(3) The Commission's orders are in conflict with an order of the Circuit Court of Cook County, Illinois

In the preceding subsection hereof, it has been shown that the Commission has ordered Jupiter, for the past and future, to pay Phillips-Kerr 18.5 cents per Mcf, rather than approximately 17 cents. The dispute over the difference between those two amounts is precisely the issue in Jupiter's litigation against Phillips-Kerr in the Circuit Court of Cook County, Illinois, described earlier herein. As noted, that is a contract action by

Jupiter to establish its contractual right to retain approximately 2.5 cents per Mcf of the 19.5 cents per Mcf which it will receive from Tennessee (Tennessee will pay only 19.5 cents irrespective of these proceedings or the Circuit Court case results), and its duty to pay Phillips-Kerr only 17 cents per Mcf. The quotations from the Commission's April 3, 1968 Order which are set forth in the preceding subsection of this brief show that the Commission itself recognizes that such contract action is properly for a court to decide.

In the Circuit Court action, Phillips-Kerr first moved to dismiss Jupiter's complaint or, alternatively, to hold the proceedings in abeyance until the Commission had ruled on a then pending motion of Phillips-Kerr, claiming that primary jurisdiction was in the Commission.* The Circuit Court denied that motion, by order of January 12, 1968.

Phillips-Kerr also moved that Jupiter be required to deposit into escrow the same amounts—the difference between the 18.5 cents per Mcf and 17 cents, since 1966—which the Commission has now ordered Jupiter to pay to Phillips-Kerr. The Circuit Court, by Order of February 23, 1968, denied the motion to escrow, ruling that there was no reason to deprive Jupiter of its possession of the stakes of the litigation and require the monies to be escrowed. Now, the Commission's order would require Jupiter to pay over those stakes to Phillips-Kerr, and allow those companies to hold them.

Thus, the Commission's Orders are directly in conflict with the February 23, 1968 order of the Circuit Court of Cook County. Although this fact has been re-

* Significantly, Phillips-Kerr did not even allege that Jupiter's complaint failed to state a cause of action.

peatedly pointed out to the Commission in Jupiter's pleadings, none of the Commission's Orders even mention this factor. The Commission cannot be sustained when it attempts to countermand a court order, particularly when such court is ruling in a case in which the Commission has acknowledged that the subject matter is for a court to decide, as is the case here.

That the Commission must follow, not contradict, the rulings of a court of competent jurisdiction, is established by the Commission's own holding in *Pan American Petroleum Corporation, et al.*, 32 F.P.C. 966, rehearing denied, 32 F.P.C. 1394 (1964). The Commission, in denying that it had primary jurisdiction over a contract dispute between a pipeline and a producer, then pending in a state court, held:

> "The threshold contract question presented must be decided under state law. Moreover, it is clear that if the state courts of New Mexico had already finally determined the state law question the Commission would be obligated to follow their view, and that if the state courts subsequent to a Commission determination were to reach a contrary determination then the *Commission* upon proper application *would* prospectively *revise its determination.*" (Emphasis added) (32 F.P.C. at 967, fn. 6)

The Commission's present action in the subject case constitutes a collateral attack on the order of the Circuit Court of Cook County, Illinois, and is thus invalid. The applicable principle is that of res judicata:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the

> right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pac. R.R. Co.* v. *U. S.*, 168 U.S. 1, 48-49 (1897).

Res judicata is applicable to bar proceedings by an administrative agency to hear and determine, as between the same parties, matters which have already been determined by a court of competent jurisdiction. See *George H. Lee* v. *FTC*, 113 F.2d 583 (8th Cir. 1940), where the matter at issue, the falsity of a manufacturer's advertising, had been raised and found in favor of the manufacturer in a libel proceeding brought by the Government. It was raised again when the FTC instituted proceedings against the manufacturer, charging unfair competition. In vacating a cease and desist order issued by the Commission, the Court of Appeals for the Eighth Circuit held:

> "The Commission thus plainly failed to accord to the decree in the libel proceeding the effect to which it was entitled. The Commission redetermined an issue which was already settled by a court of competent jurisdiction and reached a contrary conclusion." (113 F.2d at 586)

See also *Commissioner* v. *Sunnen*, 333 U.S. 591, 598 (1948), and *United States* v. *Utah Construction Co.*, 384 U.S. 394, 422 (1966), holding that res judicata and collateral estoppel are applicable to administrative bodies.

The principle of res judicata is controlling here. There is identity of parties, facts and claims. The question whether Jupiter may hold the amounts in dispute pending resolution of the contractual issues was raised in the Circuit Court proceeding by Phillips-Kerr, and decided adversely to them. The Circuit Court having decided that issue, Phillips-Kerr is barred from again

raising it before the FPC, and the Commission's order purporting to deprive Jupiter of such disputed amounts is error and should be set aside.

(4) The Commission cannot require Jupiter to pay to Phillips-Kerr more than is contractually provided

In these proceedings, Phillips-Kerr seeks to charge Jupiter a price which is higher than that allowed by its contract with Jupiter. Under the rule of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), such a charge is invalid. Under *Mobile,* a natural gas company cannot unilaterally change the rates provided by contract. And while the Commission can rule that a contract rate is unreasonably high and require that it be reduced, and can also *authorize* a higher rate, it cannot, under *Mobile,* do what it here purports to do; that is, order that the contractual rate *must be increased,* without the consent of both parties to the contract.

Prior to the Orders here under review, the Commission followed *Mobile.* Thus, in its order issuing certificates to Phillips and Kerr, authorizing sales to Jupiter,* the Commission recognized that Phillips-Kerr could "secure only the in-line price [18.5 cents per Mcf] for the gas sold from the federal domain *as limited by their contractual rights,*** and in ordering paragraph (B) of that decision the Commission ordered that the initial price to Jupiter "shall *not be more than* 18.5 cents per Mcf."*** Now, however, the Commission has attempted to change that language to read that the price to Jupiter "*shall be* 18.5 cents per Mcf."

* 34 F.P.C. at 486 (1965).
** 34 F.P.C. at 488, emphasis added.
*** 34 F.P.C. at 490, emphasis added.

Nor has the Commission now decided that for some reason it no longer recognizes the *Mobile* principle, for it has enunciated it again in two recent cases. In *Gulf Oil Corp.*, Docket Nos. CI68-678, et al., issued September 18, 1968, the Commission authorized sales of natural gas at initial rates equal to "the applicable area rate . . . or the contract rate, whichever is lower" (mimeo, p. 4). And in the Southern Louisiana Area Rate Case, *Area Rate Proceeding (Southern Louisiana Area)*, AR61-2, Opinion No. 546, issued September 25, 1968, the Commission stated as follows:

> "[I]t is relevant to note that while the price to be paid for particular gas may not exceed the applicable ceiling price, it may be lower if the contract so provides." (mimeo, p. 88)

The *Mobile* doctrine reflects the concept that the public interest is not aided by allowing a company to collect more than its contract allows. Only a very limited exception to *Mobile* has been created, and the present case does not fit within it. That exception, stated in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1955), requires a strict showing that the public interest requires a higher than contract price. In *Sierra*, a companion case to *Mobile*, the seller of electric power sought to increase the contract rate to the buyer on the ground that the return permitted under the contract rate was unreasonably low. The Commission agreed that the contract rate was unreasonably low, but refused to permit a rate increase. This was upheld by this Court on appeal and, on further appeal, the Supreme Court affirmed. Pertinent here was the following statement by the Supreme Court:

> "In short, the Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. But, while it may be that the Commission may not normally *impose*

[emphasis by the court] upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. * * * In such circumstances *the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest*—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory. That the purpose of the power given the Commission by § 206(a) is the protection of the public interest, as distinguished from the private interests of the utilities, is evidenced by the recital in §201 of the Act that the scheme of regulation imposed 'is necessary in the public interest.' *When § 206 (a) is read in the light of this purpose, it is clear that a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility*" [Emphasis added].*

In these proceedings, there has not been even an attempt to show that the contractual price of 17 cents per Mcf "is so low as to adversely affect the public interest."** Instead, Phillips-Kerr simply requests that they be released from what they now seem to regard as an unde-

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* 350 U.S. at 354-55. See also, the Supreme Court's opinion in *Permian Basin Area Rate Cases*, 390 U.S. 747, 821-22 (1968). As noted by the Court in *Sierra*, § 206(a) of the Federal Power Act, 16 U.S.C. § 824e, is "substantially identical" to § 5(a) of the Natural Gas Act. 350 U.S. at 350-51.

** Jupiter reiterates that the Commission cannot operate on any assumption that the contractual rate is actually higher than 17 cents, since the Commission has properly disclaimed authority or inclination to decide such issue, and the issue will be decided by the Circuit Court of Cook County. The Commission has not indicated it has made any such assumption.

sirable 1953 contract. In other cases, the Commission has refused to increase prices on this basis.*

B. The Commission's "Reformation" of the Subject Contracts Is Invalid Under All Relevant Legal Doctrine

In addition to ignoring the substantive provisions of the Jupiter, Phillips-Kerr contracts in the Orders here under review (see Section III. A above), the Commission, in its December 13, 1968 Order, also purported to "reform" Jupiter's contracts with Tennessee and Phillips-Kerr.

As discussed above, Jupiter purchases natural gas from Phillips-Kerr for approximately 17 cents per Mcf and sells the natural gas to Tennessee for 19.5 cents per Mcf, in both cases pursuant to contracts with the parties which have been filed with the Commission and constitute the relevant rate schedules for the transactions.** However, the Commission now purports to require that Tennessee purchase directly from Phillips-Kerr, pay them 18.5 cents per Mcf and pay Jupiter only one cent per Mcf. This attempt to reform Jupiter's contract with Tennessee is invalid for several reasons.

First, Jupiter would note that the factual basis for what the Commission itself admits is a "somewhat unusual action" (see Order of December 13, 1968, p. 8) is erroneous. The Commission stated that its action was required because Jupiter was in such "flagrant" violation of its April 3, 1968 Order. As has been discussed, this is

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* See the Commission's ruling in the *Permian Basin Area Rate* case, on rehearing, 34 F.P.C. 1068, 1073 (1965), holding that if contract prices are below area rates, contract rates govern, even if the producer thus had "revenue deficiencies" thereby. In this case, no such deficiency exists.

** The sale by Jupiter to Tennessee is pursuant to Jupiter's FPC Gas Rate schedule No. 8. The sale by Phillips-Kerr to Jupiter is pursuant to Phillips' FPC Gas Rate Schedule No. 329 and Kerr's FPC Gas Rate Schedule No. 56.

not correct. Jupiter has never believed that the Commission intended its April 13 and May 24, 1968 Orders to mean what the Commission's December 13, 1968 Order stated that they mean,* and the Commission's interim action supports this view.**

In addition to the total lack of factual support for the sole ground urged by the Commission, the Commission's present attempt to reform Jupiter's contracts is invalid on other legal grounds. First, the Commission has totally ignored relevant court decisions. As the Supreme Court recently stated, in its *Permian Basin* decision, *supra*:

> "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity. See *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332." (390 U.S. at 822)

The limited public interest exception to that *Mobile* rule, which would justify the Commission in relieving one party from its contractual obligations, was discussed by the Supreme Court in its *Sierra Pacific* (*supra*; 350 U.S. at 355) and *Permian Basin* (*supra*; 390 U.S. at 822) decisions: Is the contractual rate so low as to (1) impair the financial ability of the public utility to continue its service, or (2) cast upon other consumers an excessive burden, or (3) be unduly discriminatory? See also the other cases discussed in Section III. A(4) above.

None of these factors is present in these proceedings. Indeed there was not even an attempt by the Commission,

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* See Section III A(1) of this Brief. See also pages 15-16 of Jupiter's Petition for Review herein, filed July 24, 1968.

** Why, if Jupiter's action was so "flagrant", did the Commission not act on the two Phillips-Kerr motions, but instead wait until only ten working days prior to the due date of this Brief (set pursuant to a stipulated schedule) to issue its order holding Jupiter in violation of its orders?

either in its December 13 Order or in the two earlier Orders, to show any "public necessity" requiring reformation of Jupiter's contracts. As Jupiter has pointed out (see Section III. A above), there could have been no such showing, since the only controversy in these proceedings is a private dispute between natural gas companies, with absolutely no public interest ramifications.

The Commission's attempted reformation of Jupiter's contracts also is legally invalid, as noted by Commissioner Carver, in dissent from the December 13 Order, because it violates the "filed rate" doctrine. The doctrine, stated by the Supreme Court in *Montana-Dakota Util. Co. v. Northwestern Publ. Serv. Co.,* 341 U.S. 246 (1951), is that a natural gas company

> "can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." (341 U.S. at 251)

The Order of December 13 violates that doctrine by requiring Tennessee to deviate from the applicable filed rate; that is, to ignore its contract with Jupiter, embodied in Jupiter's FPC Gas Rate Schedule No. 8, and to pay money due to Jupiter under that filed rate to Phillips-Kerr, not to Jupiter. In other words, the Commission is attempting to change Jupiter's filed rate without complying with the procedure clearly provided in Sections 4 and 5 of the Natural Gas Act (15 U.S.C. §§ 717c, 717d).*

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* A court order upholding Jupiter's position on this appeal would not violate the filed rate doctrine. Jupiter's contracts with Phillips-Kerr are embodied in Phillips' FPC Gas Rate Schedule No. 329 and Kerr's FPC Gas Rate Schedule No. 56 and, therefore, those contracts constitute the filed rates of Phillips-Kerr. Therefore, the contractual spread of approximately 2.5 cents per Mcf is a part of those filed rates.

Finally, the Commission's reformation order is invalid, again as noted by Commissioner Carver in his dissent, because it exceeds the Commission's authority under the Natural Gas Act. Indeed, it is noteworthy that the Commission did not even bother to rely upon any part of the Act in support of its action. What the Commission has done is to seize one of Jupiter's assets, that is, the amount due to it from Tennessee, and simply hand it over to Phillips-Kerr. As Commissioner Carver stated (Order of December 13, 1968, dissenting opinion, page 2),

> "the equivalence of the issued order to an order of attachment or garnishment focuses attention on the fundamental concept underlying Tennessee's objection, and my ground for dissent, which is that the Natural Gas Act, the sole source of the Commission's authority, does not encompass this kind of relief."

The Natural Gas Act, of course, provides the method by which the Commission can enforce its orders. Section 20 of the Act (15 U.S.C. § 717s) empowers the Commission to seek mandamus in a Federal District Court to require compliance with its orders. The Commission, however, explicitly chose not to follow the statutorily-prescribed procedure, because Jupiter might defend against such action and raise the same issues which are raised by this appeal. (Order of December 13, 1968, pages 4 and 5). Commissioner Carver classified such Commission arguments as "officious." Jupiter thinks this too mild an indictment, for it is difficult to conceive of a statement more disdainful of the rights of parties subject to Commission jurisdiction to defend themselves against any action of the Commission which, in their opinion, oversteps the bounds of delegated authority. The Commission already has ignored a valid order of the Circuit Court of Cook County, Illinois (see Section III. A(3), above). It apparently does not wish to take any chances that an-

other court will disagree with it. In such context, this Court's decision in *Duke Power Company* v. *FPC*, 401 F.2d 930, decided June 28, 1968, is applicable here. At 401 F.2d at 947, this Court refused an FPC attempt to expand its authority over acquisitions, where statutory authority exists for alternative remedies. In these proceedings, the Commission has attempted, without statutory authority, to "reform" Jupiter's contracts, allegedly to obtain compliance with its orders, when Section 20 of the Natural Gas Act provides for judicial enforcement of Commission orders. The Commission's self-help remedy is invalid.

C. The Commission Erred in Ruling that It Has Jurisdiction Over the Rates Charged for the Transportation of Liquid Condensate

(1) Introduction

In its April 3, 1968 Order, the Commission agreed that Jupiter performs non-jurisdictional services, but disagreed with Jupiter's contention that the rates charged for the transportation of liquid condensate—which is not gas—are not subject to Commission jurisdiction. The Commission's assertion of jurisdiction over such transportation is another example of inexplicable Commission discrimination against Jupiter, since the Commission, only two months before, had issued a general policy notice in which it proposed not to regulate the rate for liquids transportation (see subsection 3, below), and has repeatedly disavowed jurisdiction over liquids (see subsection 2, below). Assertion of Commission jurisdiction would be of no benefit to consumers of natural gas.

The Commission's April 3, 1968 Order also states that any questions regarding Jupiter's contractual right to be paid for transportation of liquids are for the courts, but that Jupiter would then need Commission authoriza-

tion before it can collect that price, because the service is jurisdictional. (R. 3735) That ruling is illogical, since if the Commission actually has jurisdiction over the rate for liquid transportation, it would not be for a court to determine the rate. Thus, this is still another example of the Commission's over-eagerness to reduce Jupiter's revenues, even though the consumers will not be aided at all thereby, since the consumers do not purchase the liquids. Rather, the liquids are a separate product, ownership of which is retained by the producers, who then sell the product separately for their additional profit.

The Commission's apparent rationale for asserting rate jurisdiction over the transportation of condensate is that the same facilities are jointly used to transport both natural gas and condensate, that such transportation occurs simultaneously, and that the amount of condensate transported is relatively small compared to the amount of natural gas transported. That rationale does not support Commission rate jurisdiction over condensate transportation, but it does indicate procedures the Commission may use in its *gas* regulation to protect consumers, and Jupiter agreed with such procedures in its Petition for Rehearing to the Commission (R. 3754 to 3783, particularly 3757-58, 3761-64). First, the Commission can, and does, regulate Jupiter's charge for transporting natural gas. Beyond this, however, the Commission has certificate jurisdiction over the jointly used transportation facilities; that is, the Commission can either grant or deny authority to construct facilities which will carry a combined gas and condensate stream, including such capacity, if any, as might be "extra" in order to carry the condensate portion of the stream, and the Commission can either grant or deny authority to transport a natural gas stream which carries condensate along with it.

Furthermore, the Commission can insure, by either of two methods, that the natural gas consumer will be protected from the burden of those costs of jointly used facilities which are attributable to uses other than the transportation of natural gas: First, in some situations the Commission can allocate out of the cost of service applicable to the transportation of natural gas the portion of total transportation costs applicable to the transportation of condensate. The Commission has followed this policy in the past and, indeed, has proposed to follow this policy in the future. This will be discussed more thoroughly in subsection (3) below. Alternatively, the Commission can credit any revenues received for the transportation of condensate to jurisdictional operating expenses. The Commission also has, on occasion, followed this policy in the past, and this Court at one time urged it upon the Commission as being required in the circumstances.*

Thus, Jupiter does not contest Commission authority necessary to protect the consumer; rather, it contests only the attempt to set the rates which Jupiter can charge for the transportation of condensate, which is not gas and is irrelevant to the natural gas consumer.

(2) Liquid condensate is not natural gas within the meaning of the Natural Gas Act

The Commission's authority under the Natural Gas Act, as amended, 15 U.S.C. § 717 et. seq., is limited to the transportation and sale for resale of natural gas.

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to

* *The City of Detroit, Michigan* v. *FPC*, 230 F. 2d 810 (D.C. Cir. 1955).

> natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." 15 U.S.C. § 717(b)

"Natural gas" is defined as follows:

> "'Natural gas' means either natural gas unmixed, or any mixture of natural and artificial gas." 15 U.S.C. §717a(5)

The issue of whether liquid condensate is "natural gas," *as the latter term is used in the Natural Gas Act*, has not been judicially determined. The principal reason for this, no doubt, stems from the fact that the Commission has not previously claimed jurisdiction over condensate. This is not surprising, since it is quite clear as a factual matter, and on the basis of available authority, including past Commission decisions, that condensate is not natural gas.

First, liquid condensate is not in a gaseous state when the transportation by Jupiter occurs. A standard definition of "natural gas" refers specifically to its gaseous state, thereby excluding liquid condensate:

> "Hydrocarbons which at atmospheric conditions of temperature and pressure are in a gaseous phase." Williams and Meyers, Manual of Oil and Gas Terms, p. 240 (2d ed. 1964)

Lending support to this definition of natural gas being limited to hydrocarbons in a gaseous state is *Navajo Tribe of Indians* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966), where the court held that helium was included in a grant of "all the oil and gas deposits." The decision was primarily based on the gaseous state of helium.

Because of the physical fact that condensate is not in a gaseous state at atmospheric temperatures and pres-

sures, it is easily separated from the wellhead natural gas stream by a simple mechanical separation device. In fact, condensate could not be maintained in a gaseous state during the normal gathering, transmission and distribution through which natural gas proceeds on its way to the consumer.

This leads to the second reason why liquid condensate is not gas and, thus, is not jurisdictional under the Natural Gas Act. Liquid condensate cannot be transported through cross-country transmission lines or in distribution systems used for the transportation of gas in any manner whereby the condensate may be used by the consumer. In fact, such transportation and distribution of condensate would normally be highly detrimental to a pipeline or a distribution company's facilities, as well as to the fuel-burning equipment of the consumer.

Third, although the division of the various substances in the oil-gas spectrum varies depending upon the purpose for which the division is made, condensate is consistently recognized and treated as separate from gas. Thus, the clear distinction between liquid condensate and natural gas is recognized in regulations issued by The Geological Survey of the Department of the Interior. See 30 C.F.R. § 221.2(o) (1968). A recent series of decisions dealing with the proper construction of the term "a well producing gas only" also recognizes a distinction between liquid condensate and natural gas. See *Vernon* v. *Union Oil Co. of California*,, 270 F.2d 441 (5th Cir. 1959), rehearing denied, 273 F.2d 178 (1960); *Duke* v. *Sun Oil Co.*, 320 F.2d (5th Cir.), rehearing granted on another issue, 323 F.2d 518 (1963); and *Davis* v. *Laster*, 138 So. 2d 558 (La. 1962). The courts in those cases held that a "gas well" capable of producing liquid condensate in paying quantities is not "a well producing gas only" within the

terms of a shut-in royalty clause in an oil and gas lease. The court in *Vernon* held:

> "Liquid condensate, not being possessed of these attributes *at the critical point,* i.e., when prepared for market, is not therefore 'gas' within the intendment of the constructive production provision." (270 F.2d at 446)

The court in the *Duke* case referred to liquid condensate as a "liquid 'non-gas' product." (320 F.2d at 863)

Similarly, in *Mid-Continent Petroleum Corp v. Blackwell Oil & Gas Co.,* 15 P. 2d 1028, 1035 (Okla. 1932), the court held that the defendant was not entitled to liquid condensate under a contract whereby the plaintiff-lessee sold to the defendant "all of its gas rights" under an oil and gas lease.

The above discussion, however, may be superfluous to this appeal, since it was presented to the Commission in Jupiter's Petition for Rehearing (R. 3771 to 3776), and yet the Commission nowhere in its Order of May 24, 1968, denying rehearing, claims that liquid condensate is natural gas (nor did it do so in its original Order of April 3, 1968 or in the December 13, 1968 Order). Rather, the Commission asserts jurisdiction to regulate the rate charged for transporting liquid condensate (but not the sales price of that condensate) in the following language:

> "The condensate is part of the raw natural gas emerging at the wellhead, and is part of the raw gas stream as transported. Jupiter's attempt to distinguish the transportation of condensate from that of the remainder of the gas stream is, in reality, solely an exercise in semantics. There is, in Jupiter's line, but one raw gas stream, and the condensate is a part of it. While this Commission does not assert jurisdiction to regulate the price at which liquids are sold after their removal from the gas stream,

In other words
it's all one ball
of wax

it does assert jurisdiction in this proceeding over any rates which Jupiter may charge for its transportation of the condensate and liquefiable hydrocarbons as a part of the gas stream." (R. 3822-3823)

There are two things of note at this point concerning this purported basis for jurisdiction over non-natural gas products. First, Section 1 of the Natural Gas Act, quoted above, confers jurisdiction only over natural gas, and Sections 4 and 5 of the Act (15 U.S.C. §§ 717c and 717d), which cover the Commission's rate-making authority, are concerned only with "natural gas." Thus, there is nothing in the Natural Gas Act which confers power upon the Commission to regulate the rates of anything but natural gas. The Commission, therefore, has no jurisdiction to regulate the rate charged for transporting liquid condensate or any other non-natural gas product.

Secondly, the Commission itself has recognized that rate jurisdiction over liquid condensate is not required to protect the natural gas consumer, by explicitly deciding not to "assert" jurisdiction over the price at which liquids are sold. But Section 1 of the Natural Gas Act, quoted above, confers jurisdiction over both the transportation *and* (not or) the sale for resale of natural gas. Where is the justification for saying that "we have jurisdiction over the rate for transportation of liquid condensate, but not over its sale price for resale"? There is none and, indeed, the Commission has offered none. If one is required to protect consumers, certainly the other must be also. And if both are required, then the Commission has erroneously failed to fulfill its entire statutory obligation. Compare *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). The answer, of course, is that neither direct rate regulation of condensate transportation nor regulation of condensate sales is required to protect the natural gas consumer.

In the past, the Commission itself has frequently disclaimed jurisdiction over liquids. See *United Gas Pipe Line Company,* 31 F.P.C. 1180, 1191 (1964):

> "Union is engaged in the sale of natural gas, natural gas liquids and oil. Only the sale of gas is subject to regulation."

See also *Florida Gas Transmission Co.,* 37 F.P.C. 424, 437 (1967):

> "This Commission's jurisdictional reach does not extend to the liquid products."

And in the *Permian Basin Area Rate Proceeding,* AR61-1 both the Presiding Examiner (34 F.P.C. 306, 311 (1964) and the Commission (34 F.P.C. 159, 209 (1965) made the same ruling.

All evidence of record before the Commission supports the lack of Commission jurisdiction, since even the Commission's own Staff, in earlier hearings in these proceedings—both Staff witness, John M. Munn, and Staff Counsel Joseph McShalley (R. 393 to 398)—stated that the transportation of condensate is not jurisdictional, that the Commission cannot and does not regulate the rate for such transportation, and that the Commission and its Staff are only "concerned with the charge for bringing the *gas* ashore." (Emphasis added).

It is against the background of the above statements disavowing jurisdiction over liquid products that the Commission's ruling in these proceedings must be viewed. Indeed, not only did the Commission fail to assert rate jurisdiction over liquids prior to its decision in these proceedings, but it has failed to assert such jurisdiction since that time. (See cases discussed in the next subsection of this Argument.) It can only be concluded that the Commission has attempted to treat Jupiter differently from any other natural gas company, without any justification.

and that the Commission's attempt must fail for this reason, if no other.

(3) The Commission's decision herein is inconsistent with its own policy as set forth in a proposed statement of general policy, as followed in the past, and as subsequently applied

On February 5, 1968, the Commission issued a Notice of Proposed Statement of General Policy in Docket No. R-338, "Pipeline Costs Allocable to the Transportation of Liquids, Liquefiable Hydrocarbons, etc. for others" (This Notice has been reproduced as Appendix A to this Brief). At page 3 of that Notice, the Commission stated as follows:

> "We have reached a tentative conclusion that it might be preferable and sufficient for purposes of consumer protection, to allocate out of the cost of service applicable to other jurisdictional services the liquid transportation costs in pipeline cases, *leaving it to the pipelines to negotiate fair compensation from the owner of the liquids or the liquefiable hydrocarbons.*" (Emphasis added)

This clearly states that the Commission plans to allocate pipeline costs between the natural gas and liquid condensate "components," but that the Commission *will not* attempt to set the compensation which the pipeline will receive for carrying the liquid condensate. Comments on such policy have been received, but no other order has been issued. The question necessarily arises, why, in view of this proposed policy, did the Commission nevertheless, in the present case, assert jurisdiction to set Jupiter's rate for transporting liquid condensate for Union and Phillips-Kerr? Jupiter does not know the answer to that question in view of the fact that it brought the proposed policy to the Commission's attention in its Petition for Rehearing (R. 3761), but the Commission failed to com-

ment on this point in its Order of May 24, 1968 denying rehearing.

Jupiter agrees that the Commission's proposed policy would be appropriate if applied to Jupiter's operation. (See the Introduction to this section of the Argument.) It also would be consistent with Commission practice prior to the issuance of the Notice of Proposed Statement of General Policy. For example, in *Permian Basin, supra,* the Commission took into account revenues received by the producers for liquid products in reaching the appropriate ceiling prices for natural gas. See 34 F.P.C. at 195-197, 208-210, and, in the order denying rehearing, 1073. The following statement by the Commission at 34 F.P.C. 209 indicates the Commission's rationale in the *Permian* case:

> "The Commission has no jurisdiction over the price at which liquids are sold but if payment for the raw stream is made in whole or in part on the basis of a percentage of liquids or liquid revenues, the Commission may still consider the liquid credits in controlling the amount of the payment for the gas."

See also *City of Detroit* v. *FPC,* 230 F.2d 810 (D.C. Cir. 1955), *cert. denied, sub nom. Panhandle Eastern Pipe Line Co.* v. *City of Detroit,* 352 U.S. 829 (1956); and *Panhandle Eastern Pipe Line Co.* v. *FPC,* 305 F.2d 763 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 916 (1963).

The policy enunciated in the Notice of Proposed Statement of General Policy has also been followed *since* the Commission Orders in the instant case. The revenue credit policy announced in *Permian Basin* was followed in the Commission decision in the Southern Louisiana Area Rate Case, *supra,* and in the Presiding Examiners' Initial Decisions in *Area Rate Proceeding* (*Hugoton-Anadarko Area*), AR64-1, issued September 16, 1968, and in

Area Rate Proceeding (*Texas Gulf Coast Area*), AR64-2, issued September 16, 1968.

Also subsequent to the Orders in the instant proceedings, on September 4, 1968, the Commission granted a certificate to Tidal Transmission Company in Docket No. CP68-323. Tidal proposed to perform precisely the same type of service as Jupiter: transportation onshore, from offshore fields, of a commingled stream of natural gas and liquid condensate. The Commission authorized Tidal's operations, stating, in Ordering paragraph (E):

> "(E) The allocation of cost associated with the transportation of liquids shall be subject to any determination in the proceeding pending in Docket No. R-338. Nothing herein shall be construed as indicating that the charge for transportation of liquids, provided for in the contract between Applicant and the producers, will necessarily be deemed to be adequate in determining the appropriate cost to be attributed to the pipeline facilities herein authorized or utilized for such transportation in any rate case determining Applicant's cost of service for the transportation and sale for resale of natural gas in interstate commerce."

The Commission nowhere in the *Tidal Transmission* order gave any indication that it intended to assert rate jurisdiction over the transportation of liquids proposed by the Applicant; rather, as noted, the Commission merely conditioned the certificate on the proceedings in Docket No. R-338, which is the proposed policy docket discussed above, which disclaimed regulation over such rate. (See also the Commission's order in *Gulf Oil Corporation*, Docket Nos. CI68-678, *et al.*, issued September 18, 1968.)

Thus, the above is merely an illustration, in addition to the cases cited in subparagraph (2) above, that the Commission, for some unstated and unexplained reason, has chosen to treat Jupiter differently from all other

companies which have appeared before it in similar situations, both before Jupiter and after Jupiter, and that the Commission's treatment of Jupiter is totally inconsistent with the general policy proposed by the Commission.

(4) Jurisdiction to regulate rates for the interstate transportation of liquids has been vested in the Interstate Commerce Commission

The attempt by the Commission in these proceedings to assert jurisdiction over the rate charged by Jupiter for the transportation of liquid condensate is outside the authority granted to the Commission and is in direct contravention of the regulatory scheme expressly established by Congress. Under Chapter 49 of the United States Code, such rates are clearly within the jurisdiction of the Interstate Commerce Commission. 49 U.S.C. § 1 provides, in part, as follows:

> "(1) The provisions of this chapter shall apply to common carriers engaged in—
>
> * * *
>
> "(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, . . ."

The term "common carrier" is specifically defined to include "all pipe-line companies" (49 U.S.C. § (3)(a)) and 49 U.S.C. § 6 gives the Interstate Commerce Commission rate jurisdiction over common carriers subject to the provisions of Chapter 49.

This express grant of authority clearly indicates the intent of Congress to restrict the Federal Power Commission's jurisdiction to natural gas and to give jurisdiction over hydrocarbons in liquid form to the Interstate Commerce Commission. In fact, this division of regulatory authority and responsibility has been expressly recognized by this Court and by the Federal Power Commis-

sion. See *Mid-America Pipeline Co.* v. *FPC,* 330 F.2d 226 (D.C. Cir. 1964), and *City of Pittsburgh* v. *FPC,* 237 F.2d 741 (D.C. Cir. 1956). With regard to the same facility involved in the *City of Pittsburgh* case, the Federal Power Commission itself, at many points in its Opinion 303, *Texas Eastern Transmission Corp.,* 17 F.P.C. 843 (1957), also recognized the exclusive jurisdiction in the Interstate Commerce Commission to regulate the rates for transportation of liquid products. See 17 F.P.C. 845, 848, 851.

(5) There are no valid policy reasons to support the Commission's assertion of jurisdiction to regulate the rates charged for the transportation of condensate

The Commission can fully exercise its duties under the Natural Gas Act without undertaking to regulate the rates charged for the transportation of condensate, which is not delivered and sold to interstate pipelines, and thus is not sold to local distribution companies and the natural gas consumer. This is true for several reasons.

(a) The Commission exists for the protection of the natural gas consumer. See *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 685 (1954). Full protection of the consumer can be accomplished without Commission regulation of the charge for transportation of condensate (or the sales price of condensate), as long as the Commission has and exercises jurisdiction to (1) regulate the price paid by Tennessee for the natural gas which it purchases from Jupiter and Union; (2) regulate the maximum price paid for natural gas by Jupiter to Phillips-Kerr; (3) regulate Jupiter's rates for the transportation of *natural gas*; and (4) allocate Jupiter's pipeline cost of service among the natural gas and condensate components of Jupiter's operation, as proposed by the Commission in its Notice

of Proposed Statement of General Policy in Docket No. R.-338, discussed above. As previously stated, in the Introduction to this section of the Argument, Jupiter has no quarrel with the Commission's authority to exercise this described jurisdiction, and, indeed, the Commission does exercise such jurisdiction. In addition, the Commission has the power, through its certificate and abandonment approval authority (15 U.S.C. § 717f), to limit the utilization, for non-jurisdictional services, of facility capacity which has been dedicated to service for the natural gas consumer. Therefore, the Commission also has adequate control to prevent Jupiter from attempting to use a greater proportion of its pipeline capacity for condensate transportation (assuming that were physically possible) when that capacity is needed for the transportation of natural gas, to the detriment of the producers, Tennessee or the natural gas consumers.

Thus, the further extension of the Commission's jurisdiction to cover regulation of the rate for transportation and/or the sale price of liquid condensate is unnecessary.

(b) Beyond the area of the immediate concern with the interests of the natural gas consumer, there will not exist any "attractive" regulatory gap or, for that matter, any regulatory gap at all (see *Phillips Petroleum Co.* v. *Wisconsin, supra*; *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-22, 27-28 (1961); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 467-474 (1950)) if the Commission fails in its attempt to assert jurisdiction over the rate for transporting condensate. Either the Interstate Commerce Commission (interstate commerce) or the Louisiana Public Service Commission (intrastate commerce) has jurisdiction. See LSA-R.S. 45: 251-265, dealing with Louisiana Commission jurisdiction over condensate transportation.

Further, even if there were a gap—as there is not—the Commission itself does not take the position that all gaps *must* be closed. See *Florida Gas Transmission Co.,* 37 F.P.C. 424, 438 (1967), where the Commission stated that gaps are only closed to prevent evils, citing avoidance of increased prices to consumers and inferior use of natural gas, neither of which is involved in this case. Commission reduction of Jupiter's contractual rate for hauling condensate would simply benefit the producers, without any corresponding benefit to the consumers of natural gas.

(6) The cases cited by the Commission do not support the assertion of jurisdiction over the rates for transportation of condensate

In support of its assertion of jurisdiction over the rates for transporting condensate, the Commission cited three cases in its April 3 Order, and one case in the May 24 Order denying rehearing. An examination of those cases reveals nothing whatsoever to support the Commission's assertion of such jurisdiction. None of the four cases involved any claim by the Commission to jurisdiction over condensate and, therefore, the courts deciding those cases could not have passed on the problem.

For example, an examination of the facts in *Deep South Oil Co.* v. *FPC,* 247 F.2d 882 (5th Cir. 1957), clearly indicates that there was no issue before the Commission of jurisdiction over condensate and, therefore, the decision of the Fifth Circuit could not, and did not, go to this point. The only relevant issue in the case was whether "casinghead gas" was subject to the jurisdiction of the Commission. "Casinghead gas" is merely natural gas which is produced as a by-product from an oil well; otherwise, casinghead gas is the same as any other natural gas. The Presiding Examiner's initial decision in *Deep*

*South** makes it quite clear that liquid condensate was not involved in that case and, in fact, that such condensate had been removed prior to the point at which the Commission was concerned with the question of whether the casinghead gas was natural gas within the meaning of the Natural Gas Act.

Panhandle Eastern Pipe Line Co v. *FPC,* 359 F.2d 675 (8th Cir. 1966), held that although the Commission had no jurisdiction over helium itself, it did have certificate jurisdiction over helium-bearing gas. Thus, that case, rather than supporting the Commission argument, actually supports Jupiter's argument. That is, Jupiter does not contest Commission jurisdiction over condensate-bearing gas, or certificate authority over the combined stream, but it does contest Commission jurisdiction over the rate for transporting the condensate itself.

Louisiana Public Service Comm'n v. *FPC,* 359 F.2d 525 (5th Cir. 1966), was not even concerned with any non-natural gas product. All that the court held, in affirming the Commission, was that the Federal Power Commission, and not the Louisiana Public Service Commission, had jurisdiction over sales of natural gas made by an interstate pipeline in Louisiana, some of which gas was produced from on-shore fields in Louisiana and some of which was produced from fields in the adjoining offshore continental shelf. Some of the gas was sold at wholesale in Louisiana and the rest was transported to other states for wholesale sales there. This case is just another in the series of "commingling" cases, following *California* v. *Lo-Vaca Gathering Co.,* 379 U.S. 366 (1965), and *FPC* v. *Amerada Petroleum Corp.,* 379 U.S. 687 (1965). No

* 14 F.P.C. 308 (1955), affirmed by the Commission, 14 F.P.C. 83 (1955).

product other than natural gas was involved in any of those three cases and all three of the cases go only to the point of whether a certain commodity, admittedly gas, is "in interstate commerce" when commingled with gas destined for out-of-state transportation and sale. None of these cases reaches the point in issue here; i.e., whether the Commission has jurisdiction over non-gas liquids which do not affect gas consumers.

The final case cited by the Commission to support its assertion of jurisdiction in these proceedings is the decision by the Supreme Court in *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). The Commission's reliance on this case to support its assertion of jurisdiction in these proceedings is beyond Jupiter's comprehension, since, as noted above in subsection (2) of this portion of the Argument, the Commission stated in its own *Permian* opinion, which was under review in the Supreme Court, that it "has no jurisdiction over the price at which liquids are sold. . . ." (34 F.P.C. 159, 209 (1965)) The Supreme Court in no way dealt with Commission jurisdiction over the rate charged for transportation of condensate or for the price at which condensate is sold, since the Commission did not assert jurisdiction over either of those activities in the *Permian Basin* case. The Commission did assert jurisdiction over the sale of casinghead *gas,* and this is the jurisdictional assertion upheld by the Supreme Court, as can be seen by examining footnote 111, 390 U.S. at 820, together with the text accompanying that footnote. With regard to condensate, what the Commission did in *Permian Basin* was to take into account the revenues which producers would receive from liquid condensate in establishing the maximum area price at which casinghead gas and other natural gas could be sold, but it did not attempt to determine the proper price for the liquid

condensate portion of the casinghead gas, and did not even know the amount which the producers received for such condensate (see 34 F.P.C. at 1073, 390 U.S. at 820).

(7) Conclusion

The Commission's assertion of jurisdiction in these proceedings over the rate which Jupiter may charge for the transportation of condensate is not unlike the situation recently faced by this Court in *Duke Power Co.* v. *FPC*, 401 F.2d 930 (1968). That case involved a decision by the Commission requiring an interstate electric utility to obtain Commission approval of its acquisition of facilities utilized in the local distribution of electric energy. This Court reversed, holding that the Commission did not have jurisdiction to require such approval. The Court stated as follows:

> "We do not gainsay the importance of tools adequate to forestall accounting abuses which ultimately and unfairly create higher charges for electricity, nor do we overlook the practical values which Commission control over all property augmentations could create. Other provisions of the Act, however, arm the Commission with formidable weapons with which to eradicate fictitious write-ups, and these, we think, serve to further militate against the adoption of the expanded construction of the acquisition clause which is urged upon us." (401 F.2d at 947)

In the instant proceedings, Jupiter does not even know the policy basis, if any, upon which the Commission purports to base its assertion of jurisdiction to regulate the rate for transportation of condensate, since the Commission in the Orders here under review made no claim to any underlying policy consideration. If, indeed, the Commission's underlying rationale for its assertion of jurisdiction is the protection of natural gas consumers, which, as pointed out above, is the primary objective

of the Natural Gas Act, then Jupiter believes that it has shown beyond dispute that such protection can be afforded with the "formidable weapons" which the Commission concededly already has (see the Introduction to this portion of the Argument). Direct rate regulation of the transportation or sale of liquid condensate is unnecessary to accomplish the objective of protecting the natural gas consumers, and it exceeds the Commission's jurisdiction.

D. The Order of December 13, 1968 Is Invalid Because the Commission Had Lost Jurisdiction of These Proceedings

The Commission Order of December 13, 1968 purports to reiterate the prior April 3 and May 24, 1968 Orders. But in reality, it modifies them, most clearly in the fact that it orders, for the first time, that Jupiter pay over $700,000 to Phillips-Kerr, and that Tennessee must begin to buy gas from Phillips-Kerr, rather than from Jupiter, and pay Jupiter only a service charge. Such Order is therefore invalid, under Section 19 (a) of the Natural Gas Act. (15 U.S.C. §717r(a)), which provides in part as follows:

> "Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter."

On or about November 1, 1968, the Commission, pursuant to Section 19 (b) of the Natural Gas Act, 15 U.S.C. §717r (b), and Rule 17 of the Federal Rules of Appellate Procedure, filed a "Certificate of Record in Lieu of Record" in this Court in these proceedings. Thus,

any alleged "expertise" of the Commission, and the court may exercise a broad scope of review authority.

In *Atlantic Refining Co.* v. *Public Service Comm'n of NY*, 360 U.S. 378 (1959) the Supreme Court emphasized that the responsibility of the Commission was to the consumer.

> "The purpose of the Natural Gas Act was to underwrite just and reasonable rates *to the consumers* of natural *gas*. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). As the original §7 (c) provided, it was 'the intention of Congress that natural *gas* shall be sold in interstate commerce for resale *for ultimate public consumption* for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' 52 Stat. 825. The Act was so framed as to afford *consumers* a complete, permanent and effective bond of protection from excessive rates and charges. . . . The overriding intent of the Congress *to give full protective coverage to the consumer* as to price is further emphasized in §5 of the Act, 15 U.S.C. §717d, . . ." (360 U.S. at 388-389; emphasis added)

Because the issue presented in this proceeding involves a question which is outside of the peculiar responsibility awarded to the Commission by Congress, and outside the Commission's "expertise", the Commission's action does not fall within the limited-review domain of administrative agencies and this court has the power of *full* review over this issue. See *American Ship Building Co.* v. *NLRB*, 380 U.S. 300 (1965), where the court, in reversing the NLRB, considered the scope of Board expertise and judicial review:

> "The Board has justified its ruling in this case and its general approach to the legality of lockouts on the basis of its special competence to weigh the

competing interests of employers and employees and to accommodate these interests according to its expert judgment. . . .

There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems. In many areas its evaluation of the competing interests of employer and employee should unquestionably be given conclusive effect in determining the application of §§ 8 (a) (1), (3), and (5). However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management.

. . . Sections 8 (a)(1) and (3) do not give the Board a general authority to assess the *relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power*. . . .

. . . Indeed, the role assumed by the Board in this area is *fundamentally inconsistent with the structure of the Act* and the function of the sections relied upon. The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by congress." (380 U.S. at 315-318) (Emphasis added)

In these proceedings, the Commission has attempted to override contractual limitations and court decisions, and decide how revenues are to be divided between Jupiter and Phillips-Kerr, even though such decision does not affect the public and takes the Commission outside its congressionally allowed judisdictional sphere. Under such circumstances, no judicial deference is due and the Commission should be reversed.

CONCLUSION

For the reasons set forth above, Jupiter requests that this court modify the Commission's Orders of April 3, May 24, and December 13, 1968, and hold:

1. That Jupiter need not increase its monthly payments, or make up alleged past "shortages", to Phillips-Kerr, pending trial of the Circuit Court of Cook County, Illinois case between them; and

2. That Tennessee must continue to pay Jupiter, not Phillips-Kerr, for gas received from Jupiter.

3. That the Commission has no jurisdiction to control the rate for transportation of liquid condensate.

Respectfully submitted,

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

(18 CFR Part 2)

Pipeline Costs Allocable to the Transportation of Liquids, Liquefiable Hydrocarbons, etc. for others

Docket No. R-338

NOTICE OF PROPOSED STATEMENT OF GENERAL POLICY

(February 5, 1968)

1. Notice is given pursuant to Section 4 of the Administrative Procedure Act, 5 U.S.C. 553 (1967), the Commission is contemplating adopting a statement of general policy providing that where a natural gas pipeline company transports liquids and/or liquefiable hydrocarbons for others, the Commission will, regardless of whether a charge is made for such transportation, allocate an appropriate portion of the transportation costs to that transportation and deduct such amounts from the jurisdictional cost of service in reviewing and determining the rates chargeable to the pipeline's sales of natural gas for resale in interstate commerce.

2. A pipeline company does not always purchase the entire stream of gas that it receives. Sometimes, the pipeline receives the stream of gas at or near the producer's wellhead and, by agreement, allows a producer processing plant down stream to remove the liquefiable hydrocarbons. The plant normally makes some proportionate reimbursement to the pipeline for the consequent reduction in the raw stream; or the pipeline pays the producer for the volume of residue gas received from the plant. Thus, the ultimate consumers of gas are not charged for a larger stream than they get. However, unless the pipeline is also reimbursed for transporting the liquids from field to plant, or unless the value of the

pipeline facilities so utilized is eliminated in determining the cost of service applicable to other jurisdictional customers of the pipeline, the other customers would be charged for a portion of the pipeline's transportation facilities which are not used for their benefit. Particularly in situations involving the transportation of liquids produced off-shore to on-shore extraction plants, these additional costs may be significant.

3. The Supreme Court has cautioned us to take into account the pipeline's transportation of others' liquids. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 392-393. Recently we recognized in a temporary certificate a mutual agreement for the producer to reimburse the pipeline for transporting for the producer a volume of processing plant fuel and entrained liquefiable hydrocarbons. *Shell Oil Co.*, Docket No. CI68-91, letter order of October 4, 1967.

4. Transactions of this type may occur often, especially with regard to production off the shore of Louisiana. It will, we believe, be unnecessary and unduly cumbersome to resolve these matters as they come up case by case, particularly since the matter may first reach the Commission in a request for a temporary authorization to permit the producer to make a sale to meet emergency conditions. Nor do we presently believe the problem can be treated effectively as part of the future area rate determinations; present indications are that while the cost or value of such free transportation may be significant for some pipelines in some areas, on an overall basis the problem will not be substantial. Of course, we reserve the right to consider the problem in any future area proceeding where it appears to involve a generally significant factor in pipeline costs. We have reached a tentative conclusion that it might be preferable and sufficient for purposes of consumer protection, to allocate out of the cost of service applicable to other jurisdictional services the liquid transportation costs in pipeline cases, leaving it to the pipelines to negotiate fair com-

pensation from the owner of the liquids or the liquefiable hydrocarbons. But before adopting any general policy to guide our future actions we believe it advisable to secure the comments of all interested parties.

5. Pending adoption of any such general policy, the Commission will issue producer certificates as follows: Proposed sales involving pipeline transportation of producer liquids and/or liquefiable hydrocarbons from off-shore to on-shore will be certificated with a condition that the certificate authorization is issued subject to the ultimate disposition of this rulemaking proceeding. Other proposed sales involving pipeline transportation of producer liquids, etc. may also be certificated subject to that condition if the transportation is for substantial distances.

6. We propose, subject to consideration of comments by interested parties, to amend Part 2, General Policy and Interpretations, Chapter I, Title 18 of the Code of Federal Regulations by adding a new § 2.65 to read as follows.

§ 2.65 Pipeline costs allocable to the transportation of liquids, liquefiable hydrocarbons, etc. for others.

In reviewing and determining the costs that are allocable or ascribable to sales by pipeline companies of natural gas for resale or to transportation of natural gas in fixing pipeline rates therefor, the Commission will, insofar as the pipeline company transports onshore from offshore for substantial distances liquids, liquefiable hydrocarbons, and related fuel for others, allocate an appropriate portion of transportation costs to such liquids, liquefiable hydrocarbons, etc., regardless of whether the pipeline company has separately charged therefor.

It may also be appropriate to supplement this proposed statement of general policy in accordance with responses to questions and issues posed in paragraph 7 below.

7. In addition to such other comments as the parties may wish to submit there are a number of particular questions with respect to which we solicit the views of interested parties.

(a) Should a preferred or intended method of allocation of costs to the pipeline's transportation of liquids and liquefiable hydrocarbons be stated as part of the policy, and, if so, what method should that be? Or should the particular methods be determined at the time of pipeline rate review and rate determination?

(b) Should standards of immateriality be stated whereby *de minimis* transportation of others' liquids would not be costed, and if so, what should be considered *de minimis?*

(c) How should pipeline transportation of others' liquids be identified: by footnote to the pipeline's Form 2 identification of the related gas sale or by special report, etc.?

(d) Should transactions certificated prior to this notice (or our final order herein) be taken into account in any subsequent pipeline rate proceedings. If not, what if any should be the manner of dealing with such transactions?

(e) Should pipelines be required to specify in their tariffs whether they charge for transportation of producer liquids and, if so, the terms therefor?

8. This policy statement is proposed to be issued under the authority contained in Sections 4(e), 5(a), and 16 of the Natural Gas Act (52 Stat. 822, 823, 830 (1938); 76 Stat. 72 (1962); 15 U.S.C. 717c, 717d, 717o).

9. Any interested person may submit to the Federal Power Commission, Washington, D. C. 20426, not later than March 22, 1968, data, views and comments in writing concerning the amendment here proposed. An original and 14 conformed copies should be filed with the

(Appendix)

Commission. Submissions to the Commission should indicate the name and address of the person to whom correspondence in regard to the proposal should be addressed. The Commission will consider all such written submissions before acting on the matters here proposed.

By direction of the Commission.

Gordon M. Grant,
Secretary.

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JOINT APPENDIX

In The

United States Court of Appeals

For The District of Columbia Circuit

Nos. 22154, 22693

The Jupiter Corporation,

Petitioner,

v.

Federal Power Commission,

Respondent,

Tennessee Gas Pipeline Company,

a Division of Tenneco, Inc.,

Phillips Petroleum Company and Kerr-McGee Corporation,
Long Island Lighting Company,

Intervenors.

10

No. 22442

Union Oil Company of California,

Petitioner,

v.

Federal Power Commission,

Respondent,

Tennessee Gas Pipeline Company,

a Division of Tenneco, Inc.,

Phillips Petroleum Company and Kerr-McGee Corporation,
Long Island Lighting Company,
The Jupiter Corporation,

Intervenors.

ON PETITIONS TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

FIDELITY PRINTING COMPANY, INC., HOUSTON

TABLE OF CONTENTS

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Washington, D.C. 20426

CAPTION

[1231]

EXHIBIT NO. 2
WITNESS ....

FEDERAL POWER COMMISSION
DOCKET NO. RI63-212
THE JUPITER CORPORATION
GAS GATHERING, OIL AND GAS DIVISION

TRANSPORTATION DEPARTMENT
OPERATING DATA AND ALLOCATION OF COST OF SERVICE
FOR THE YEAR ENDED DECEMBER 31, 1962

BUREAU OF NATURAL GAS
HOUSTON FIELD OFFICE
HOUSTON, TEXAS

Docket RI63-212
Exhibit 2

THE JUPITER CORPORATION

Gas Gathering, Oil and Gas Division
Transportation Department
Operating Data and Allocation of Cost of Service
For The Year Ended December 31, 1962

INDEX

Docket RI63-212
Exhibit 2
Schedule 1

THE JUPITER CORPORATION

Gas Gathering, Oil and Gas Division
Transportation Department
Gas Purchased
For The Year Ended December 31, 1962

(1) Month	(2) Mcf at 15.025 psia	(3) Amount Total	(4) Amount Per Mcf
Purchases from Phillips, Kerr-McGee:			
January	1,742,001	$ 329,871	18.93633
February	1,601,433	303,204	18.93329
March	1,758,631	332,967	18.93331
April	1,692,117	320,374	18.93332
May	1,732,503	328,020	18.93330
June	1,663,701	314,994	18.93333
July	1,694,718	320,866	18.93331
August	1,732,709	328,059	18.93330
September	1,692,373	320,422	18.93330
October	1,753,027	331,906	18.93331
November	1,677,523	317,610	18.93327
December	1,713,168	324,359	18.93329
Total	20,453,904	$3,872,652	18.93356 (A)

(A) The sales price to Tennessee, 22.8333 cents per Mcf, exceeds the purchase price by 3.9 cents per Mcf, as follows:

Sales price to Tennessee		22.8333¢
Less:		
Allowance for Transportation	2.4¢	
State of Louisiana Severance tax — not accrued for payment to Phillips, Kerr-McGee (75% of 2¢ per Mcf)	1.5	3.9000
Purchase price		18.9333¢

Docket RI63-212
Exhibit 2
Schedule 2

THE JUPITER CORPORATION
Gas Gathering, Oil and Gas Division
Transportation Department Revenues — Rollover Field
Per Books and Adjusted
For The Year Ended December 31, 1962

Line	(1) Particulars	(2) Mcf at 15.025 psia	(3) Revenue	(4) Average Revenue ¢/Mcf
1	*Gas Purchased from Phillips-Kerr McGee:*			
2	Gas Sales to Tennessee—Per Books	19,770,266	$4,514,210	22.83333
3	Less Normalizing Adjustment[1]	652,029	148,881	22.83349
4	Sales to Tennessee—Adjusted	19,118,237	4,365,329	22.83332
5	Gas Sales to Phillips—Per Books	514,816	117,550	22.83340
6	Plus Normalizing Adjustment[1]	652,029	148,881	22.83349
7	Sales to Phillips—Adjusted[2]	1,166,845	266,431	22.83345
8	Total Gas Sales	20,285,082	4,631,760	22.83333
9	Liquid Sales to Phillips—Per Books		34,900	
10	Plus Normalizing Adjustment[1]		47,300	
11	Liquid Sales Adjusted	—	82,200	—
12	Totals—Per Books	20,285,082	4,713,660	23.00538
13	Plus Normalizing Adjustment[1]			
14	Totals—Adjusted	—	47,300	—
15	*Gas Transported for Pure Oil Co.:*			
16	Delivered to Tennessee—Actual	31,706,192	1,078,618	3.40192
17	Less Normalizing Adjustment[1]	887,067	30,292	3.41485
18	Delivered to Tennessee—Adjusted	30,819,125	1,048,326	3.40154
19	Delivered to Phillips—Actual[3]	731,007	24,771	3.38861
20	Plus Normalizing Adjustment[1]	887,067	30,292	3.41485
21	Delivered to Phillips—Adjusted[2]	1,618,074	55,063	3.40300
22	Total Transported	32,437,199	1,103,389	3.40162
23	Totals—Transportation Department—Per Books	52,722,281	5,770,049	
24	Plus Normalizing Adjustment[1]	—	47,300	
25	Totals—Adjusted	52,722,281	5,817,349	

[1] Adjustments to reflect a full years' operation of Phillips' Absorption Plant which was placed in service on 7-30-62 — volumes and revenues for Jan.-July were estimated on basis of actual experience for Aug.-Dec.

[2] Represents shrinkage and fuel in Phillips' Absorption Plant.

[3] Actual fuel and shrinkage volumes for July 30 through Dec. 31 in gas transported for Pure — revenue computed at average transportation rate.

* Includes 1.5¢ per Mcf for Louisiana Severance Tax.

[1235]

Docket RI63-212
Exhibit 2
Schedule 3

THE JUPITER CORPORATION
Gas Gathering, Oil and Gas Division
Transportation Department Gas Balance — Rollover Field
Actual and Adjusted
For The Year Ended December 31, 1962

	(1)	(2)	(3)	(4)
		MCF at 15.025 Psia		
Line	Particulars	Actual	Normalizing[1] Adjustments	Adjusted
1	*Gas Received*			
2	Gas Purchased from Phillips-Kerr-McGee	20,453,904	—	20,453,904
3	Gas Received from Pure for Transp.	32,710,834	—	32,710,834
4	Total Receipts	53,164,738	—	53,164,738
5	*Gas Deliveries*			
6	*Gas Sales*			
7	To Tennessee	19,770,266	(652,029)	19,118,237
8	To Phillips	514,816[2]	652,029	1,166,845
9	Total Sales	20,285,082	—	20,285,082
10	*Delivery of Gas Transported for Pure*			
11	Delivered to Tennessee	31,706,192	(887,067)	30,819,125
12	Delivered to Phillips	731,007[2]	887,067	1,618,074
13	Total—Transported for Pure	32,437,199	—	32,437,199
14	*Unaccounted for Gas*[3]			
15	Gas Purchased	168,822	—	168,822
15	Gas Transported	273,635	—	273,635
17	Total—Unaccounted for Gas	442,457	—	442,457
18	Total Deliveries	53,164,738	—	53,164,738

[1] Estimated fuel and shrinkage volumes to reflect a full years' operation of Phillips' Absorption Plant.

[2] Actual volumes of fuel and shrinkage during operations of Phillips' plant from July 30 through December 31, 1962.

[3] Includes fuel and shrinkage in Jupiter's Lake Arthur Separation and Dehydration Plant.

Docket RI63-212
Exhibit 2
Schedule 4

THE JUPITER CORPORATION
Gas Gathering, Oil and Gas Division
Transportation Department — Rollover Field
Allocation Of Cost Of Service
And Comparison Of Adjusted Revenues With Allocated Costs
For The Year Ended December 31, 1962

	(1)	(2)	(3)	(4)	(5)
		MCF at	Cost of Service		
Line	Particulars	15.025 psia	Transportation	Purchased Gas	Totals
	ALLOCATION OF COST OF SERVICE:				
1	Sales of Gas:				
2	Jurisdictional to Tennessee	19,118,237	$ 94,723	$3,649,888	$3,744,611
3	Nonjurisdictional to Phillips ..	1,166,845	5,781	222,764	228,545
4	Total Gas Sales	20,285,082	100,504	3,872,652	3,973,156
5	Transportation of Gas for Pure:				
6	Jurisdict. Delivery to Tennessee Gas Transmission Co.	30,819,125	152,695	—	152,695
7	Nonjurisdictional to Phillips....	1,618,074	8,017	—	8,017
8	Total Gas Transported	32,437,199	160,712	—	160,712
9	Transportation of Condensate (in combination for Phillips-Kerr McGee and Pure—Note A)	273,571	1,355	—	1,355
10	Total Transportation Dept.	52,995,852	$262,571	$3,872,652	$4,135,223

Line	ADJUSTED REVENUES COMPARED WITH ALLOCATED COSTS:	Adjusted Revenue	Excess Of Revenue Over Cost	Average Revenue ¢/MCF	Average Cost ¢/MCF
1	Sales Of Gas:				
2	Jurisdictional to Tennessee	$4,365,329	$ 620,718	22.833	19.587
3	Nonjurisdictional to Phillips....	348,631	120,086	29.878	19.587
4	Total Gas Sales	4,713,960	740,804	23.239	19.587
5	Transportation Of Gas:				
6	Jurisdictional Del. to Tennessee Gas Transmission Co.	1,048,326	895,631	3.402	.495
7	Nonjurisdictional to Phillips....	55,063	47,046	3.403	.495
8	Total Gas Transported	1,103,389	942,677	3.402	.495
9	Transportation Of Condensate (In Combination—Note A)....	—	(1,355)	—	.495
10	Total Transportation Dept.	$5,817,349	$1,682,126	10.977	7.803

NOTE A—310,171 barrels (estimated X .882 (MCF of Vapor/Bbl of liquid). The annual volumes of condensate transported were estimated by applying to the annual volumes of gas sold and transported the ratio of the condensate volume to the gas volume on the system's coincidental peak day.

CAPTION

[1269]

THE PURE OIL COMPANY

STATEMENT
IN SUPPORT OF
REDETERMINED PRICE

INDEX

[1270]

EARLY HISTORY OF ROLLOVER FIELD AND NEGOTIATIONS FOR SALE OF GAS

In order that the Commission may understand and properly appraise the circumstances under which the Rollover gas was originally discovered and marketed, we submit the following early history. This background demonstrates that the original gas sales contract was negotiated under such extreme economic duress as to amount to a "forced sale". We feel that the Commission will conclude that the substantial variance between the present as opposed to the proposed price is attributable to the fact that the present price is far too low, rather than that the proposed price is too high.

The leases in question were acquired by sealed bid from the State of Louisiana in 1946 and 1947, and are located in the Gulf of Mexico approximately ten miles offshore from Vermilion Parish. This primary terms of the leases had a scheduled expiration date of November 26, 1951.

Exploration effort was commenced in the latter part of 1947 and included, among other things, the acquisition of a Government LST, the modification of same as a tender, and the design and construction of a drilling platform. Spudding in of Well A-1 occurred on August 1, 1948, and after drilling to a depth of 8,888 feet, severe high head salt water caused [1271] cessation of operations. Well No. A-2 was started on November 21, 1948, but was abandoned although it did disclose presence of gas sands. Drilling of Well No. A-3 was finally completed as a gas producer on June 3, 1949. The average cost of these wells was in excess of $500,000 each. Examination of the information available as a result of this drilling indicated that there were sub-

stantial hydrocarbons in place, but they were gaseous rather than liquid. At this period in the development of the natural gas industry, no one had ever attempted to transport gas by subterranean pipe line from the Gulf of Mexico to shore. Not only were there no existing pipe lines in the offshore area of these Rollover wells — no one had yet demonstrated that it was possible or economically feasible to construct same. A further depressing aspect was that there was no major pipe line within approximately twenty miles of the point onshore adjacent to the production.

The geological data then available indicated gas reserves on the order of 250 billion cubic feet. This data, admittedly scanty, left Pure somewhat upon the horns of a dilemma as to how to proceed: on the one hand, it could drill more of these enormously expensive wells and if the reserve picture was enhanced, place itself in a stronger bargaining **[1272]** position with potential pipe line purchasers or, on the other hand, it could immediately seek a firm offer and, if successful, proceed with development and drilling with the knowledge that it would have some sort of market. The first alternative would undoubtedly have been followed but for the fact that expiration of the primary terms of the leases was only two years away, and it was not at all certain at the time that even if larger reserves were encountered a subterranean pipe line could be constructed. Since the gas was discovered without any associated oil, Pure was not in the position to hold the leases by oil production and await orderly development of the offshore gas market. Faced with these uncertainties, Pure elected to go to the bargaining table — without knowing that its recoverable gas reserves were actually three times as large as they were then thought to be. Of course, in interesting prospective pipe line purchasers in the under-

taking of the then untried task of laying a subterranean pipe line, the size of the proposed gas reserve dedication was of utmost importance.

Contacts were made with Interstate Gas, Tennessee, Transcontinental, United Gas Corporation, Trunkline and Gulf **[1273]** Coast Northern Pipe Line. The latter two were only paper organizations at the time, and as a matter of record neither of the systems then contemplated and which might have been able to take the Rollover gas, has ever been constructed. After thus contacting all possible purchasers in the general area, Pure had received no encouragement. In September, 1949, Marine Gathering Company, a new and at the time wholly paper organization, learned of Pures' efforts to locate a buyer for the Rollover gas, and suggested negotiation for a contract. Having exhausted all other sources of market, Pure elected to institute serious negotiations with Marine during the month of November, 1949. It is again to be noted that the primary term of the original leases was running against Pure, and that in the over-all picture it appeared that the remaining two years were on the order of a minimum in which contractual negotiations could be concluded and the remaining work looking toward assuring deliverability of volumes necessary to load the pipe line could be accomplished.

It must be remembered that offshore drilling and producing operations were then still in their infancy. In addition to the enormous technical problems involved in drilling in over forty feet of open sea, the now highly efficient **[1274]** weather warning system was then very crude and as a result Pure constantly suffered interruptions and delays in order to insure the safety of its workmen. Tremendous advances have since occurred and a great deal can now be accomplished in two years. But in the early

years of offshore development such a period of time seemed short indeed.

Negotiations continued until March 15, 1950, when Pure, still having been unable to locate any other purchaser, signed a contract with Marine by which Marine agreed to purchase gas in the field, transport it to shore, and thence to a major pipe line company for resale. The original sales price was 4.5¢ per mcf @ 15.025 psia as opposed to the then current average field price onshore of approximately 9¢ per mcf. Subsequent to the execution of the Pure-Marine contract, Tennessee announced plans to extend its line from its Kinder, Louisiana terminal to a point some twenty-six miles east of the town of Creole, Cameron Parish, Louisiana. This gave Marine a market without the necessity of constructing a lengthy onshore pipe line and deliveries were commenced March 23, 1951. As it turned out Marine was able to overcome the enormous technical problems in excellent time, and although hindsight indicates that subterranean transportation [1275] of natural gas was indeed possible and economically feasible, it must be borne in mind that Pure had been unable to interest a single major pipe line company in undertaking this job of pioneering. The price Pure had to pay in order to procure a purchaser with "pioneering spirit" was the very low initial price clause in the contract. Development continued and reserve data now indicates original recoverable gas reserves of approximately 760 billion cubic feet (14.65 psia). Pure did indeed have an "ace in the hole", but because of the peculiar circumstances existing at the time of negotiation, the "ace" remained buried until after the contract was signed.

IF PURE IS TO DEVELOP ADDITIONAL DOMESTIC GAS RESERVES, IT NEEDS ADDITIONAL GAS REVENUES

The Pure Oil Company is an *integrated* oil company. It not only produces, but also refines and markets. Therefore, we would be less than candid with the Commission if we suggested that our interests in these other two fields do not in some measure influence our decisions to explore for additional hydrocarbon reserves. We freely admit that to effectively compete with other integrated companies, we

• • • •

[1422]

CAPTION

AGREEMENT entered into this 6th day of February, 1953, between The Marine Gathering Company, a Delaware corporation, herein called "Marine", and Phillips Petroleum Company, a Delaware corporation herein called "Phillips" and Kerr-McGee Oil Industries, Inc., a Delaware corporation, herein called "Kerr-McGee".

WITNESSETH:

WHEREAS, Phillips and Kerr-McGee have had issued to them the oil and gas leases described in Exhibit "A", attached hereto, which are presently productive of gas and which Phillips and Kerr-McGee believe will be further productive, and

WHEREAS, Phillips and Kerr-McGee desire to market the gas produced from the lease described in said Exhibit "A", and

WHEREAS, Marine has a market for certain volumes of gas and is concurrently herewith entering into a con-

tract with Niagara Gas Transmission Limited, a copy of which is attached hereto as Exhibit "B" and herein called the "Exhibit "B" Contract", under which it will sell the volumes of gas therein provided.

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements herein stipulated to be faithfully kept and performed by the parties hereto, it is agreed:

1. *Definitions* — For the purposes of this contract the following definitions shall be applicable:

(a) The term "gas" shall include casinghead gas produced with crude oil and natural gas produced from gas wells; and the term "condensate" or the term "liquid hydrocarbons" shall mean all liquefied or liquefiable hydrocarbons produced with gas and not found in the liquid state in the reservoir at virgin conditions of reservoir

* * * *

[1433]

6. *Quality of Gas* — Except as hereinafter otherwise provided, Phillips and Kerr-McGee agree that the gas delivered hereunder will be merchantable gas and will, upon delivery to Marine:

(a) Have a total heating value of not less than one thousand (1,000) British thermal units per cubic foot, determined as provided in Subsection (h) of Section 9 hereof; however, should the total heating value of all the gas delivered hereunder fall below one thousand (1,000) British thermal units per cubic foot during any month, the total amount payable as the purchase price for gas under Section 10 hereof for such month during which such condition exists, shall be reduced by an amount determined by mul-

tiplying such total amount by a fraction having as its numerator the deficiency of British thermal units below one thousand (1,000), and as its denominator one thousand (1,000):

(b) Be commercially free from dust, and contain not more than seven (7) pounds of water vapor per million cubic feet, at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and a temperature of sixty degrees (60°) Fahrenheit, as determined by dew-point apparatus approved by the Bureau of Mines;

(c) Have a temperature of not more than one hundred twenty degrees (120°) Fahrenheit, and contain no more than twenty (20) grains of total sulphur, nor more than one (1) grain of hydrogen sulphide, per one hundred (100) cubic feet.

7. *Separation and Delivery of Condensate:*

(a) Marine shall accept, along with the gas delivered hereunder, the condensate produced with such gas, and gather any such combined gas **[1434]** and condensate to a point on shore where Marine shall erect, install, maintain and operate at its sole cost, risk and expense a plant to mechanically separate the condensate from the gas delivered hereunder, and Marine shall, in addition to the payment of the amounts payable to Phillips and Kerr-McGee under the other provisions of this contract, deliver to Phillips and Kerr-McGee, free of cost and expense to Phillips and Kerr-McGee, in storage to be furnished by Phillips and Kerr-McGee, all of the condensate and liquid hydrocarbons so recovered. In the event the gas and condensate delivered hereunder to Marine is commingled with gas and condensate received by Marine from others, the amount of condensate and liquid hydrocarbons attributable to Phillips

and Kerr-McGee's gas delivered hereunder shall be equal to that proportion of Marine's total plant condensate and liquid hydrocarbon production that the metered condensate volume (after correction as provided in Subsection (b) of this Section) plus the lliquid content of the gas delivered hereunder by Phillips and Kerr-McGee (determined by Testing Code 101-43 as adopted by the American Gas Association) bears to the metered volumes of all condensate received by Marine plus the liquid contents of all gas so determined and received by Marine. Marine's mechanical separation plant shall be operated by Marine at its maximum efficiency within the limits of the equipment installed and shall be at least as efficient as an ordinary oil field separator. Marine agrees to provide, free of cost to Phillips and Kerr-McGee, at or adjacent to Marine's plant site, a location upon which Phillips and Kerr-McGee may erect and maintain storage facilities, with capacities totaling up to two thousand (2,000) barrels.

* * * *

[1441]

(m) Marine and Phillips and Kerr-McGee shall have the right to inspect equipment installed or furnished by the other, and the charts and other measurement or testing data of the other, at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of charts shall be done only by the party installing and furnishing the same. Each party shall preserve all original test data, charts and other similar records, in its possession, for a period of at least six (6) years.

(n) Phillips and Kerr-McGee shall, at Phillips and Kerr-McGee's expense, furnish Marine all necessary data required for calculating volumes delivered during the preceding twenty-four (24) hour period, and the results of any test for quality made during such period.

10. *Prices* — The prices to be paid by Marine to Phillips and Kerr-McGee for all gas delivered to Marine, or, if available and not taken by Marine, to be paid for by Marine hereunder, shall be as follows:

(a) From the date of first deliveries under this contract and during the period of time covered by the provisions of item (i) of Subsection (a) of Section 3 hereof, the price shall be 3.8237 cents per MCF.

(b) During the period of time covered by the provisions of item (ii) of Subsection (a) of Section 3 hereof the price per MCF shall be the "applicable price" described in items (i) and (ii) of this Subsection (b) as such "applicable price" may be adjusted by the provisions of items (iii) and (iv) of this Subsection (b).

(i) The "applicable price" for any period shall be a price per MCF equal to the price per MCF provided to be paid **[1442]** during the same period by Niagara Gas Transmission Limited to Marine in Subsections (a), (b) and (d) of Section 9 of the contract between those two companies attached hereto as Exhibit "B" regardless of whether or not such price is actually paid: provided that, in the event a redetermination of price is not made, as provided in Subsection (b) of Section 9 of said contract between Niagara Gas Transmission Limited and Marine, for any one or more of the periods specified therein, then for the purpose of establishing the "applicable price" hereunder, Phillips and Marine shall make such redetermination of price in accordance with the provisions of said Subsection (b);

(ii) If, at any time, Marine receives a price per MCF, for the gas which it purchases hereunder, higher than the above described "applicable price", then

during such time as Marine receives such higher price, the price received by Marine hereunder shall be deemed to be the "applicable price".

(iii) The "applicable price" for each month shall be adjusted by subtracting therefrom three cents (3¢); provided, that (x) if the contract quantity during such month is less than thirty thousand (30,000) MCF, there shall be subtracted from such "applicable price" as so adjusted an additional amount equal to fifteen one-hundredths (0.15) cent for each one thousand (1,000) MCF of portion **[1443]** thereof by which the contract quantity during such month is less than thirty thousand (30,000) MCF; and, (y) if the daily contract quantity during such month exceeds thirty thousand (30,000) MCF, there shall be added to the "applicable price" as so adjusted an amount equal to two one-hundredths (0.02) cent for each one thousand (1,000) MCF or portion thereof by which the daily contract quantity during such month exceeds thirty thousand (30,000) MCF.

For example: If the contract quantity during a month is twenty-eight thousand (28,000) MCF, there shall be deducted from the "applicable price" for such month, under the provisions of this item (iii), a total of three and three-tenths (3.3) cents; however, if the contract quantity during a month is thirty-two thousand (32,000) MCF there shall be deducted from the "applicable price" for such month, under the provisions of this item (iii), a total of only two and ninety-six one hundredths (2.96) cents.

(iv) The "applicable" price as adjusted in item (iii) above shall be further adjusted each month by mul-

tiplying it by a fraction, the numerator of which shall be the total volume of gas, measured by Marine, for said month that remains after separation in Marine's plant and after deducting or correcting for all gas used by plant operations and all gas flared or otherwise lost, and the denominator of which shall be the total volume of gas **[1444]** gathered by Marine from all sources connected to Marine's said plant; however, the adjustment provided in this item (iv) shall not be made in the event the fraction referred to is less than one (0.1). All volumes referred to herein shall be measured and computed in accordance with the standards contained in Section 9 hereof.

(c) Phillips and Kerr-McGee shall pay all Federal and State of Louisiana production, severance, or similar taxes now being levied in respect of or applicable to the gas delivered hereunder; provided, however, that if any such taxes in addition to or greater than those being levied at the date hereof are hereafter levied and Phillips and Kerr-McGee are liable for the payment or collection of such additional or greater tax, so long as such additional or greater tax is in effect and paid by Phillips and Kerr-McGee on such gas, Marine will reimburse Phillips and Kerr-McGee for three-fourths (¾) of the amount by which such additional or greater tax shall exceed the taxes now levied. Marine shall pay the gathering tax imposed by Act No. 11, Louisiana Laws of 1948, in respect of or applicable to gas delivered hereunder and any and all similar taxes hereafter levied or assessed by Federal or State of Louisiana laws in respect of or applicable to such gas, whether imposed upon or payable by Marine or by Phillips and Kerr-McGee; provided, however, that during any time when the amount of such taxes is in excess of the amount

of tax levied by said Act No. 11, Phillips and Kerr-McGee shall reimburse Marine for one fourth (¼) of such excess. The amount for which reimbursement is to be made by Phillips and Kerr-McGee to Marine or by Marine to Phillips and Kerr-McGee under this paragraph may be billed monthly or at the end of each calendar year.

In the event Marine is liable for and pays any tax, levy or other assessment with respect or applicable to the condensate or liquid hydrocarbon [1445] delivered hereunder to Marine by Phillips and Kerr-McGee, Phillips and Kerr-McGee will reimburse Marine each month for the full amount thereof.

(d) Anything in this contract to the contrary notwithstanding, if at any time after date of initial delivery of gas hereunder, Marine pays a higher price to any producer for other gas delivered to Marine at a point in the Gulf of Mexico more than five miles from shore, Marine will increase the price per MCF payable to Phillips and Kerr-McGee hereunder to such higher price paid such other producer during the period of time it is paying such higher prices to such other producer.

(e) In the event Phillips and Kerr-McGee's ceiling price, during any billing period, is less than the prices herein provided, Phillips and Kerr-McGee will accept and Marine shall pay such ceiling price.

11. *Billings and Payments*:

(a) On or before the 15th day of each month after deliveries of gas and condensate are commenced Phillips and Kerr-McGee's representative shall render Marine a statement for the preceding month showing the amount of gas and condensate delivered hereunder, the amount due hereunder and information sufficient to explain and support

any adjustments in volume made by Phillips and Kerr-McGee in determining the amount billed.

(b) Marine will adjust the amount due, as shown on the statement received from Phillips and Kerr-McGee, in accordance with the provisions of item (iv) of Subsection (b) of Section 10 hereof and will pay Phillips and Kerr-McGee's said representative at the address as shown in Section 18 hereof, on or before the 25th day of each month, or as to statements rendered after the 15th, within ten (10) days after receipt of such statements, the amount due hereunder as so adjusted for the preceding month and will furnish a statement

* * * *

[1450]

protected in acting in reliance upon any and all acts and things done or performed by, or agreements with respect to the aforestated matters made by such representative in behalf of Phillips and Kerr-McGee as fully and effectively as though each had done, performed or made or executed the same.

18. *Miscellaneous:*

(a) No waiver by Marine or Phillips and Kerr-McGee of any default of the other under this contract shall operate as a waiver of any future default, whether of a like or a different character.

(b) This agreement shall bind and inure to the respective successors and assigns of the parties hereto; but no assignment shall relieve any party of such party's obligations hereunder without the written consent of the other parties.

(c) Marine agrees that it will not modify the Exhibit "B" contract without the written consent of Phillips and

Kerr-McGee and that it will use its best efforts to perform and enforce such contract.

(d) Except as herein provided, any notice, request, demand, statement or bill provided for in this contract or any notice which either party may desire to give to the other shall be in writing and shall be considered as duly delivered when mailed by registered mail to the appropriate post office address as follows:

Marine: The Marine Gathering Company
315 Oil and Gas Building
Houston, Texas

Kerr-McGee: Kerr-McGee Oil Industries, Inc.
Kerr-McGee Building
Oklahoma City, Oklahoma

Phillips: Phillips Petroleum Company
Bartlesville, Oklahoma

* * * *

[1477]

February 23, 1953

Re: Gas Purchase Contract dated February 6, 1953, between Marine, Phillips, and Kerr-McGee, Rollover Field, Vermilion Area, Louisiana.

Phillips Petroleum Company
Bartlesville, Oklahoma

Attention: Mr. R. B. Stewart

Kerr-McGee Oil Industries, Inc.
Kerr-McGee Building
Oklahoma City, Oklahoma

Attention: Mr. Dean A. McGee

Gentlemen:

Under date of February 6, 1953, The Marine Gathering Company (Marine), Phillips Petroleum Company (Phillips) and Kerr-McGee Oil Industries, Inc. (Kerr-McGee) entered into an Agreement whereby Phillips and Kerr-McGee agree to sell and Marine agrees to purchase certain gas and condensate produced from the Rollover Field located in the South half of Block 39, Vermilion Area, Loufollows:

Subsection (b), Section 2 of said contract provides as isiana.

"(b) If for any reason the Exhibit "B" contract is terminated in accordance with any of its provisions

• • • •

[1480]

It is distinctly understood by Marine that Phillips and Kerr-McGee may, at any time after the termination of the Exhibit "B" Contract, and shall in no event later than March 1, 1956, make an election under either items (i) or (ii). H.E.K.; D. A. M.; G.B.L.

Referring to Subsection (b) of Section 10 of the Marine, Phillips and Kerr-McGee Contract, in the event a new contract is secured to replace the Exhibit "B" Contract with prices per MCF greater than those provided in the Exhibit "B" Contract, it is agreed that for the purposes of Subsection (b) of Section 10 of the Marine, Phillips and Kerr-McGee Contract, the "applicable price" shall be the price per MCF paid to Marine under such new contract, and the adjustments provided for in items (iii) and (iv) of said Subsection (b) shall be made with respect to said applicable price, to the end that difference between

the price per MCF received by Marine and the price per MCF paid by Marine to Phillips and Kerr-McGee shall not be more than the amount of the adjustment provided for under items (iii) and (iv) of said Subsection (b).

Referring to said item (iii) of Subsection (b) of Section 10 of the Marine, Phillips and Kerr-McGee Contract, if at an time and for any reason Marine is required to reduce the amount per MCF specified under said item (iii) as **[1481]** the adjustment to be made to the applicable price under said Subsection (b), or if, after an assignment of said Contract Marine continues to gather the gas and condensate delivered under said Contract and Marine is required to reduce the amount per MCF payable to it for such service to an amount per MCF less than the amount per MCF specified in said item (iii), then in either such event, the price payable to Phillips and Kerr-McGee under said Subsection (b) shall not thereby be reduced, but shall be increased by an amount per MCF equivalent to the amount per MCF by which such amount specified in said item (iii) or receivable by Marine is reduced, to the end that Phillips and Kerr-McGee will receive for gas delivered under said Contract the applicable price per MCF less only the amount per MCF to which said amount specified under said item (iii) is reduced or the amount per MCF actually received by Marine for gathering of such gas and condensate.

Except as herein amended and supplemented, the Marine, Phillips, and Kerr-McGee Contract shall remain unchanged. This amendment shall inure to and bind the respective successors and assigns of the parties hereto.

If the above is agreeable with your Company, please signify your acceptance in the space provided and

* * * *

[1500]

COMMONWEALTH OIL COMPANY
Texas National Bank Building
Houston, Texas

October 2, 1958

Phillips Petroleum Company
Att'n: Natural Gas Department
Bartlesville, Oklahoma

Kerr-McGee Oil Industries, Inc.
Kerr-McGee Building
Oklahoma City, Oklahoma

Re: Adjustment of Gas Takes from Hog Bayou and Rollover Fields, Offshore State of Louisiana

Gentlemen:

Please refer to the gas purchase contract between Commonwealth Oil Company, successor to the Marine Gathering Company (hereinafter called "Commonwealth") and Phillips Petroleum Company and Kerr-McGee Oil Industries, Inc. (hereinafter called "Phillips-Kerr-McGee"), dated February 6, 1953, as amended, such contract covering the purchase by Commonwealth of gas produced by Phillips-Kerr-McGee from the Rollover Field, offshore State of Louisiana.

That certain letter agreement dated September 22, 1958 between Commonwealth, Phillips-Kerr-McGee, Niagara Gas Transmission, Limited (hereinafter called "Niagara") and Tennessee Gas Transmission Company (hereinafter called "Tennessee") refers to an assignment by Niagara to Tennessee dated February 6, 1953, as amended, under which the gas purchased by Commonwealth from Phillips-Kerr-

McGee under the contract referred to above is resold to Niagara by Commonwealth. Said letter agreement provides that the assignment by Niagara to Tennessee of the contract between Niagara and Commonwealth will become effective on November 5, 1958 or at such later date as the deliveries bewteen Niagara and Tennessee are in balance. and further provides that on the effective date of such assignment the price being paid to Commonwealh **[1501]** by Niagara, and which will be payable thereafter by Tennessee, will be 21.33333¢ per MCF at 15.025 psia. plus ¾ths of the additional 1¢ per MCF gathering tax imposed by article No. 8. Louisiana Laws of 1958.

The purpose of this letter agreement is to express our mutual understanding that, under the contract between Commonwealth and Phillips-Kerr-McGee dated February 6, 1953, as amended, and as determined by the price being paid by Niagara on the effective date of the assignment by Niagara to Tennessee of the contract between Commonwealth and Niagara, which price will be payable thereafter by Tennessee, the price payable by Commonwealth to Phillips-Kerr-McGee for the gas produced from the Rollover Field will be 21.33333¢ per MCF less 2.4¢ per MCF gathering charge, plus ¾ of the additional 1¢ per MCF gathering tax imposed by Article No. 8, Louisiana Laws of 1958, all at 15.025 psia, based on an average daily take per month of 60,000 MCF.

In the event such average daily take in any one month shall exceed or be less than such 60,000 MCF per day, then, in such event, the price to be paid by Commonwealth Oil Company to you shall be made in accordance with the terms and conditions set forth in Section 10. *Prices.* Subsections (b) and (c), as well as such other provisions as may be contained in the contract between Commonwealth and Phil-

lips-Kerr-McGee, as amended, and are pertinent to the matters discussed herein.

Upon execution of this letter agreement by all parties, Phillips-Kerr-McGee and Commonwealth will promptly file with State and Federal regulatory bodies having jurisdiction all necessary applications for required certificates of public convenience and necessity and will exercise due diligence in obtaining such certificates satisfacory to the respective applicant. In no event shall Phillips and Kerr-McGee be required to make any deliveries to Commonwealth under said purchase contract until such time as the Federal Power Commission shall have issued certificate satisfactory to Phillips and Kerr-McGee authorizing the sale and delivery of gas under said contract.

If the above is in accordance with your understanding of our agreement, please indicate your approval and acceptance by signing all copies of this letter and returning two executed copies

* * * *

[1666]

CAPTION

UNITED STATES OF AMERICA
Before the
FEDERAL POWER COMMISSION

In the Matter of Commonwealth
Oil Company FPC Gas Rate
Schedule Nos. 1 through 4

MOTION TO REDESIGNATE COMMONWEALTH OIL COMPANY FPC GAS RATE SCHEDULES

Comes now The Jupiter Corporation (Jupiter), and moves that the Commission redesignated Commonwealth Oil Company FPC Gas Rate Schedule Nos. 1 through 4, and supplements thereto, by appropriate numerical designation, effective as of the date of closing of the transaction, March 1, 1962, between Jupiter and Commonwealth Oil Company(Commonwealth) hereinafter described. In support thereof, Jupiter states:

1. That Jupiter and Commonwealth have heretofore entered into an Agreement of Merger pursuant to which Jupiter will acquire all the properties and facilities to which the gas sales contracts on file as said rate schedules pertain, subject to the satisfaction of certain conditions prior to the closing date. Jupiter will acquire all of Commonwealth's rights in and will assume all of its obligations with respect to said contracts, effective as of the closing date.

2. That Jupiter concurrently herewith is filing a petition to amend each certificate of public convenience and necessity issued [1667] to Commonwealth by substituting Jupiter for Commonwealth as the holder thereof, and a motion

to substitute Jupiter for Commonwealth as the respondent in the proceeding (AR61-2), effective as of March 1, 1962.

Wherefore, Jupiter prays that the Commission issue its order redesignating Commonwealth FPC Gas Rate Schedule Nos. 1 through 4 as The Jupiter Corporation FPC Gas Rate Schedules by appropriate numerical designation, effective as of March 1, 1962.

Respectfully submitted,

THE JUPITER CORPORATION

By: Carroll L. Gilliam
William J. Grove
600 Munsey Building
Washington 4, D. C.
(Signed) William J. Grove
William J. Grove
Its Attorneys

Of Counsel:

Dow, Lohnes and Albertson
600 Munsey Building
Washington 4, D. C.
Dated: February 23, 1962

[1668]

VERIFICATION

William J. Grove, being first duly sworn, deposes and says that he is attorney for The Jupiter Corporation, that he has read the foregoing document, and that the statements contained therein are true and correct to the best of his knowledge, information and belief.

(Signed) William J. Grove
William J. Grove

Subscribed and sworn to before me this 23rd day of February, 1962.

(Signed) Mildred K. Jones
Notary Public

(SEAL)

My Commission expires: September 14, 1966

[1669]

CERTIFICATE OF SERVICE

I, William J. Grove, Attorney for The Jupiter Corporation, hereby certify that I have served a copy of the foregoing "Motion to Redesignate Commonwealth Oil Company FPC Gas Rate Schedules" upon the purchaser in each respective Rate Schedule, by depositing a true and correct copy thereof in the United States mails, properly addressed and postage prepaid.

Dated as Washington, D. C., this 23rd day of February, 1962.

(Signed) William J. Grove
William J. Grove

[1670]

HYDROCARBON GATHERING AND SEPARATING AGREEMENT

THIS AGREEMENT made and entered into as of the 2nd day of January, 1957, between THE PURE OIL COMPANY, an Ohio corporation, herein called "Pure", and THE MARINE GATHERING COMPANY, a Delaware corporation, herein called "Marine",

WITNESSETH:

Pure now owns, and may also hereafter acquire, oil and gas leases covering lands located in the Gulf of Mexico

Field as herein defined. Marine owns and operates a gas and condensate gathering system from wells of Pure in the Gulf of Mexico Field to a point of interconnection at the shore line of Vermilion Parish, Louisiana, with the gas transmission system of TENNESSEE GAS TRANSMISSION COMPANY. Pure has agreed to deliver gas and condensate to said gathering system of Marine, and Marine has agreed to gather and redeliver such gas and condensate to or upon the direction of Pure, upon the terms and for the consideration herein stated.

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, it is agreed as follows:

[1671]

Section 1. *Definitions:* As herein used the following words, terms and phrases shall have the following meanings:

"Gulf of Mexico Field" shall mean the area in the Gulf of Mexico off the coast of Cameron Parish, Louisiana, and off the coast of Vermilion Parish, Louisiana, West of the West line of Range 4 East.

"Gas" and "natural gas" shall mean merchantable gas, including casinghead gas produced with crude oil, as produced in its natural state from the well or wells, which meets the quality specifications of Section 3 hereof.

"Condensate" and "gas condensate" shall mean all of those liquefied or liquefiable hydrocarbons produced, with natural gas which are found in the gaseous or vaporous state in the reservoir at virgin conditions of reservoir temperature and pressure as determined by an impartial laboratory test upon the recombined sample of gas and condensate produced at the head of the well, and shall

also include liquid condensate which may be recovered by compression of gas.

It s understood that crude oil is not included within the scope of this contract, but that the same is limited to gas and condensate as herein defined.

[1672]

Notwithstanding any other provisions of this agreement to the contrary the delivery of casinghead gas under this agreement shall be optional with Pure.

Section 2. *Quantity.* Pure agrees to deliver to Marine and Marine agrees to receive into its gathering system at the Pure delivery points provided for herein all of the gas and condensate produced from the lands and leases now owned and dedicated or hereafter acquired and dedicated under the provisions hereof by Pure in the Gulf of Mexico Field. The minimum daily quantity of gas and condensate so to be delivered and received shall be, subject to the provisions of Section 15 hereof and if deliverable at the maximum efficient rate of flow of the wells as determined by Pure and under applicable allowables, the contract quantity of gas per day which TENNESSEE GAS TRANSMISSION COMPANY is entitled to purchase from time to time under that certain agreement dated March 16, 1950, between TENNESSEE GAS TRANSMISSION COMPANY, as Buyer, and THE MARINE GATHERING COMPANY, as Seller, as amended by agreements between said parties dated February 6, 1953, April 28, 1953, and June 13, 1955, (said agreement as amended being herein called Marine-Tennessee Agreement) and the condensate attributable to such quantity of gas.

[1673]

Should Pure at any time fail to make delivery of gas and condensate hereunder because Tennessee is not at

the time receiving delivery under the Marine-Tennessee Agreement, but Tennessee for such period pays Pure for the quantities of gas which Tennessee was obligated to take or pay for, then Pure shall pay Marine the compensation due hereunder for the quantities paid for by Tennessee in like manner as though such quantities had been delivered by Pure and gathered by Marine hereunder. In such event, Pure shall be entitled to have Marine thereafter gather without cost to Pure, for delivery to Tennessee such quantities in excess of the total contract quantity for any month under and as defined in said Marine-Tennessee Agreement as Tennessee may receive and credit to make up deficiencies under Subsection (f) of Section 5 of said agreement within twelve (12) months after any such deficiencies in takes accrues.

Should Tennessee fail to take gas under the Marine-Tennessee Agreement for any reason other than force majeaure as therein defined ,and Tennessee does not pay Pure for the quantities which Tennessee is obligated to take or pay for, then Pure shall not be obligated to make payment to Marine on account of quantities not delivered hereunder, provided Pure shall within a reasonable time either require Tennessee to resume the taking of gas under the Marine-Tennessee [1674] Agreement or arrange a sale thereof to others in substantially the same daily quanities as were deliverable to Tennessee under terms which will enable Marine to gather the gas for delivery to such other purchaser and perform the other services hereunder.

Marine agrees that it will redeliver to or for the account of Pure at the Marine delivery points herein provided the quantities of gas and condensate gathered by Marine hereunder, subject, however, to such variations as may be permitted by the provisions of the agreements under which Pure may sell such gas.

Section 3. *Quality:* Pure agrees that the gas delivered by it hereunder will be merchantable gas and will meet the following quality specifications;

(a) Have a total heating value of not less than One Thousand (1,000) British thermal units per cubic foot:

(b) Shall not contain more than twenty (20) grains of total sulphur, or more than one (1) grain of hydrogen sulphide, per one hundred (100) cubic feet.

Should the average total heating value of all of the gas delivered hereunder by Pure to Marine, excluding the condensate produced with the gas, fall below One Thousand (1,000) British thermal units per cubic foot, Marine may decline to take delivery thereof.

[1675]

Should any of the gas produced from the reserves dedicated hereto fail to meet the specifications set out under Section (b) of this Section 3, Pure or Marine may, at either's option, elect to deliver or elect to refuse, as the case may be, such gas. In the event Pure elects not to deliver such gas or Marine refuses to receive such gas, the reservoir from which such gas is produced shall be released from the reserves dedicated hereto. Should Pure elect to deliver and Marine elect to receive any such gas, and in the event the gas of Pure, after removal of condensate in Marine's plant, as determined by tests to be made at the tail gate of Marine's plant, contains more than the permissible quantities of total sulphur or hydrogen sulphide, then Marine agrees to furnish a site at its plant upon which Pure may erect equipment and facilities for their removal. Pure agrees that such equipment and facilities shall be adequate in capacity to treat all such sulphur or hydrogen sulphide bearing gas of Pure's and all gas not containing objectionable quantities of sulphur or hydrogen sulphide of other sellers with which

it was commingled in Marine's lines and plant. After Pure erects the equipment and facilities above referred to, Marine agrees to operate same for the account of Pure and Pure agrees to reimburse Marine monthly for Pure's proportionate part of the actual costs thereof. In the [1676] event Marine commingles gas purchased from others with gas purchased hereunder and such other gas contains more than the permissible quantities of total sulphur or hydrogen sulphide, and it becomes necessary to treat such other gas as herein required, to be determined by tests to be made at the tail gate of Marine's plant, Marine and Pure agree that the cost of erecting the plant and facilities provided for in this Section 3, and the actual cost of operating such facilities shall be shared jointly by such other sellers and Pure on the basis of the total amount of sulphur and hydrogen sulphide contained in such gas supplied by each such seller bears to the total amount of sulphur and hydrogen sulphide contained in all of the gas which such sellers supplied.

Marine agrees that the gas redelivered by it to Pure, or delivered by it for the account of Pure, shall also conform to the foregoing quality specifications, and will have been dehydrated by Marine for removal of entrained water therein in a vapor state, so that such gas will in no event contain more than seven (7) pounds of entrained water per million cubic feet, at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch [1677] and temperature of sixty degrees (60°) Fahrenheit as determined by dew point apparatus approved by the Bureau of Mines. Marine also agrees that if the gas delivered to it by Pure conforms to the quality specifications of Section 6 of the Marine-Tennessee Agreement, except as to Subsections (b), (c) and (d) of said Section 6, then the gas which is delivered by Marine to Tennessee for the account of Pure

under said Marine-Tennessee Agreement will comply with the specifications of said Section 6, including Subsections (b), (c) and (d) thereof.

Section 4. *Measurement and Tests:* The measurement, and tests for quality of gas delivered hereunder shall be covered by the following:

(a) The delivery unit shall be one thousand (1,000) cubic feet, herein referred to as MCF.

(b) The volume shall be measured by orifice meters installed and operated, and the method of computation shall be, as prescribed in Gas Measurement Report No. 3 dated April 1955 of the American Gas Association, including the appendix thereto, applied in a practical and appropriate manner, and corrections shall be made for deviation from Boyle's Law.

[1678]

(c) The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) Fahrenheit and at a pressure of two (2) pounds per square inch above an assumed atmospheric pressure of fourteen and seven-tenths (14.7) pounds per square inch (sixteen and seven-tenths (16.7) pounds per square inch absolute).

The aforespecified pressure base shall be and remain effective as between Pure and Marine until such time as the price which Pure shall be entitled to receive from Tennessee under Section 11 of the Marine-Tennessee Agreement, as amended by Agreement of even date herewith between Marine, Pure and Tennessee called "Agreement Relating to Contracts", for gas sold by Pure to Tennessee thereunder shall be increased to an amount per MCF which is eleven per cent (11%), or more, greater than the

price per MCF specified, or the minimum price per MCF provided for, in the first two paragraphs of said Section 11 for the period applicable at the time. If and whenever the price Pure is entitled to receive is so increased and becomes effective as between Pure and Tennessee under applicable laws, rules and regulations, then it is agreed that [1679] from and after the date and time such increased price becomes effective, the unit of volume for purposes of measurement under this agreement shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) Fahrenheit and at a pressure of three hundred and twenty-five thousandths (0.325) of a pound per square inch above an assumed atmospheric pressure of fourteen and seven-tenths (14.7) pounds per square inch (fifteen and twenty-five thousandths (15.025) pounds per square inch absolute). In such event this paragraph shall thereafter govern in determining the unit of volume hereunder, and the next preceding paragraph of this Subsection (c) shall no longer be of any force or effect.

(d) Temperature shall be determined by a recording thermometer installed and continuously used so as to record properly the temperature of the gas flowing through the meters. The specific gravity of the gas flowing through the meters shall be determined by the balance method; except either upon the request of Marine or the desire of Pure, Pure will install and operate a recording gravitometer to continuously record properly the specific gravity [1680] of the gas flowing through the meters. At the request of Pure, Marine will install and operate a recording gravitometer at the Marine delivery point.

(e) Deviation from Boyle's Law at the pressures, specific gravity, and temperatures of delivery of gas from any field hereunder shall be computed by using tables from Bulletin TS-461 (1947) of the California Natural Gasoline

Association or by using such other tables or methods as may be mutually agreed upon by Marine and Pure. In computing the volume of all gas measured from the tail gate of Marine's plant, deviation from Boyle's Law at the pressures, specific gravity, and temperatures upon delivery shall be determined by joint test at intervals of there (3) months, or as often as found necessary. The apparatus and method recommended by the National Bureau of Standards, or as otherwise mutually agreed upon, shall be used in making such tests. Each test shall detemine the corrections to be used in computing volume until the next test is made.

(f) The arithmetical average of the hourly temperature and specific gravity recorded during each day, and the corrections for deviations from Boyle's Law appli- [1681]
cable during each day, shall be used to make proper computations of volume hereunder.

(g) The total heating value of the gas, excluding condensate, shall be determined by taking samples of the gas at the delivery points or at the measuring and testing points, before recombining the gas and the condensate, at such times as may be designated by either Marine or Pure, but not more often than once each month, and having the British thermal unit content thereof per cubic foot determined by an accepted type of calorimeter, for a cubic foot of gas at a temperature of sixty degrees (60°) Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two degrees (32°) Fahrenheit.

(h) Tests to determine sulphur and hydrogen sulphide shall be made by approved standard methods to be mutually agreed upon.

(i) *All measuring equipment and all testing apparatus, devices and materials which are installed by Pure shall be installed at Pure's election either at a Pure delivery point or at a Pure measuring and testing point on the producing platforms of the respective wells, upstream from the Pure delivery point for gas from such* [1682] *wells, and shall be of standard manufacture and type approved by Marine, and shall, with all related equipment, appliances and buildings be installed, maintained and operated, or furnished, by Pure, at its expense.* Marine's approval shall not be withheld for a period in excess of 21 days after notice of installation by Pure to Marine. Marine may install and operate at Marine's sole expense check measuring and testing equipment at respective points at which Pure installs Pure's measuring and testing equipment, which shall not interfere with the use of Pure's equipment.

All measuring equipment and all testing apparatus, devices and materials which are installed at the Marine delivery points shall be of standard manufacture and type approved by Pure, and shall, with all related equipment, appliances and buildings be installed, maintained and operated, or furnished, by Marine at its expense at the Marine delivery points. Pure's approval shall not be withheld for a period in excess of 21 days after notice of installation by Marine to Pure. Pure and any purchaser of gas from Pure may install and operate at Pure's or such purchaser's sole [1683] expense check measuring and testing equipment at the Marine delivery points, which shall not interfere with the use of Marine's equipment.

(j) The accuracy of *each party's and of any purchaser's measuring and testing equipment* shall be verified at least once each month and at other times upon request by the other party. Tests for quality of the gas may be made at the time of testing equipment or at other times, but not

more often than once each month. Notice of the time and nature of each test shall be given by the party who is making the test to the other party sufficiently in advance except neither party shall be required to give the other or any such purchaser this notice more than ten (10) days in advance of tests, to permit convenient arrangement for such other's party and such purchaser's representative to be present. In the event a recording gravitometer is installed to continuously record the specific gravity of gas, this gravitometer shall be tested by acme gravity balance, and the other equipment installed and operated by one party shall be tested by means and methods approved by the other party (which approval shall not be withheld for **[1684]** a period in excess of ten (10) days after notice of such means and methods to be used by the party who has installed such equipment to the other party). Tests and adjustments shall be made in the presence of and observed by representatives of both Marine and Pure, and of such purchaser, if present. If, after proper notice, the party to whom notice is given, fails to have a representative present, the results of the tests shall nevertheless be considered accurate until the next tests. *All tests made by a party or a purchaser installing operating equipment shall be made at such party's or such purchaser's expense*, except that the party who has not installed the particular equipment involved shall bear the expense of tests made at its request if the inaccuracy found is two per cent (2%) or less.

(k) If at any time any of the measuring or testing equipment is found to be out of service, or registering inaccurately in any percentage, it shall be adjusted at once to read accurately, within the limits prescribed by the manufacturer. If such equipment is out of **[1685]** service, or inaccurate by an amount exceeding two per cent (2%)

at a reading corresponding to the average rate of flow for the period since the last preceding test, the previous readings of such equipment shall be disregarded for any period definitely known or agreed upon, or if not so known or agreed upon, for a perod of sixteen (16) days or one-half of the elapsed time since the last test, whichever is shorter. The volume of gas delivered during such period shall be estimated by (i) using the data recorded by any check measuring equipment if installed and accurately registering, or if not installed or registering accurately (i) by correcting the error if the percentage of error is ascertainable by calibration test or mathematical calibration, or, if neither such method is feasible, (iii) by estimating the quantity, or quality, delivered, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of two per cent (2%) or less. Chart integration and volume computations shall be made as accurately as possible and within the accuracy prescribed by the **[1686]** manufacturer of the computing equipment used.

(1) Marine and Pure have the right to inspect equipment installed or furnished by the other, and the charts and other measurement or testing data of the other, at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of charts shall be done only by the party installing and furnishing the same. Each party shall preserve all original test data, charts, and other similar records, in its possession, for a period of at least six (6) years.

(m) The charcoal adsorption tests shall be made in accordance with Testing Code 101-43 as adopted by the American Gas Association, or some other approved method acceptable to both Marine and Pure shall be used, for test-

ing gas for condensate content; such test to be computed at four (4) ounces above an assumed atmospheric pressure of 14.7 pounds with the results adjusted to a pressure base of the number of pounds per square inch absolute which as to the respective quantities of gas involved, constitutes the pressure base at the time for the determination of the [1687] unit of volume under Subsection (c) of Section 4 hereof.

(n) Any and all tests made by Marine shall be made at Marine's expense.

(o) There shall be no tests for quality of condensate delivered commingled with gas hereunder. *Condensate shall be metered by orifice meter in conformance with accepted practice* and the metered volume shall be multiplied by a shrinkage factor to remove therefrom gases contained in solution by virtue of the pressure and temperature at which metering is accomplished. Said shrinkage factor shall be determined at least once each three (3) months or as often as found necessary, by Pure at the time of testing equipment (subparagraph (j) of this Section 4) by withdrawing a sample of condensate and determining by low temperature fractional distillation the volume percentage of hydrocarbon materials lighter than iso-pentane contained therein. The shrinkage factor shall be that percentage of iso-pentane and heavier hydrocarbons found by said analysis to be contained in the sample.

(p) In the event Pure desires or requires gas to be delivered by Marine at the Marine Delivery Point to Pure or to others as may be designated by Pure and the measurement, [1688] measurement equipment or tests for quality of such gas is different than that herein set out then this Section 4 shall be so revised insofar as such gas is concerned. Pure will reimburse Marine for its additional cost exclusive

of cost to Marine to compute gas volumes on pressure basis other than herein provided, if any, incurred as a result of such a revision.

Section 5. *Pressure:* Pure shall make delivery of gas and condensate deliverable hereunder to Marine at a pressure necessary to enable said gas to enter Marine's gathering system at the point of delivery, provided that Pure shall not be required to deliver such gas and condensate at a pressure in excess of twelve hundred (1200) pounds per square inch gauge; however, Pure shall, if so desired by Marine, make deliveries of gas and condensate at any higher pressure not to exceed fifteen (1500) pounds per square inch gauge so long as any such higher pressure can be obtained from natural well pressure flowing through Pure's equipment and so long as such higher pressure does not impair Pure's ability to deliver the minimum daily quantity provided in Section 2. hereof.

If at any time the natural pressure of any well [1689] or wells of Pure is not sufficient to deliver gas and condensate into Marine's gathering system at the point of delivery against a working pressure not to exceed twelve hundred (1200) pounds per square inch gauge, Pure may install compressors to enable it to make such delivery; and if Pure does not so elect, Marine shall have the right, at Marine's option, exercisable only to the extent a prudent operator would act under the same or similar circumstances, to install compressors for the purpose of reducing the working pressure of Marine's gathering line or lines to which such well or wells are connected so that the well or wells may deliver gas and condensate against the reduced working pressure therein. In the event Marine installs compressors, then the rate to be paid by Pure to Marine hereunder for all gas thereafter delivered from the well or wells connected to such compressors shall be increased one cent (1¢) per thou-

sand cubic feet of such gas compressed per state of compression required except in the event Pure has not accepted delivery of condensate prior to compression then the rate to be paid by Pure to Marine hereunder for all gas and condensate thereafter delivered from the well or wells connected to such compressors **[1690]** shall be increased one and one-quarter cents (1¼¢) per thousand cubic feet of such gas compressed through one stage of compression and one cent (1¢) per thousand cubic feet of such gas compressed through each additional state of compression required. In event Marine installs and compresses gas hereunder, each stage of compression shall be of as high a compression ratio as a prudent operator would deem good practice in the same or similar circumstances and in no event shall additional stages of compression be employed until the compression ratio of each stage of compression previously required exceeds two to one. Marine shall pay Pure for gas which is delivered by Pure hereunder used by Marine as fuel in operating such compressors an amount per MCF equal to the price per MCF at the time being paid to Pure under the Marine-Tennessee Agreement less an amount per MCF equal to the gathering charge per MCF payable by Pure to Marine under Subsection (a) of Section 7 hereof.

Marine shall make delivery of the gas gathered hereunder to or for the account of Pure at such pressure as Pure or the purchaser from Pure may request, not to exceed, however, one thousand (1,000) pounds per square inch gauge; unless Pure makes delivery to Marine at a higher pressure **[1691]** as hereinbefore provided. In such latter event Marine will make delivery of the gas gathered at a pressure not exceeding that at which the gas is delivered by Pure so long as such higher pressure can be obtained and maintained from natural well pressure flowing through Marine's equipment, or at such lesser pressure as may be maintained

under such conditions, but in no event less than one thousand (1,000) pounds per square inch gauge.

Section 6. *Delivery Points:*

(a) The delivery points for gas and condensate which are produced from fields which were producing at January 1, 1956, and delivered by Pure hereunder shall be at the delivery points at which gas and condensate are at the date hereof being delivered by Pure to Marine.

The delivery points for gas and condensate in any new field discovered after January 1, 1956, shall be at a central point in each such field. Pure agrees to construct, operate and maintain, at Pure's expense, such pipe line or pipe lines as may be necessary to enable Pure to deliver to Marine from Pure's well or wells the gas and condensate deliverable hereunder to said delivery point.

The respective delivery points established under this subdivision (a) are sometimes called "Pure delivery point."

(b) The delivery points for gas deliverable by Marine to Pure shall be, as to gas deliverable by Marine to TENNESSEE GAS TRANSMISSION COMPANY for the account of Pure under the aforementioned Agreement dated March 16, 1950, between Tennessee and Marine, at the present delivery point for such gas at or near the tail gate of Marine's plant.

The delivery point for all condensate delivered from Marine to Pure shall be at the tanks of Pure on the plant site of Marine.

The delivery point for gas delivered to Pure, or to purchasers from Pure other than Tennessee, shall be at a

point or points on or near Marine's plant site mutually agreeable to Marine and any other parties involved.

The respective delivery points established under this subdivision (b) are sometimes called the "Marine delivery point".

(c) At the Pure delivery points or at the Pure measuring and testing points provided for in Section 4 **[1693]** hereof, Pure shall install, operate and maintain, at its expense, suitable mechanical equipment for separating the gas and condensate and free water produced with the condensate and orifice meters of standard type for the separate measurement of the gas and condensate delivered to Marine hereunder. Pure's equipment shall include suitable devices for draining off free water. The lines of Pure in which are installed the orifice meters separately measuring the gas and the condensate shall be jointed downstream of the meters and the point of delivery to Marine shall be at a pipe flange installed by Pure on its line at a point downstream of said joinder of lines.

At the Marine delivery points for gas, Marine shall install, operate and maintain, or cause to be installed, operated and maintained, at Marine's expense the necessary orifice meters and other measuring equipment of standard type for the measuring of gas delivered by Marine to or for the account of Pure.

Section 7. *Compensation.* The compensation to be paid by Pure to Marine for the services of Marine in gathering the gas and condensate subject to this agreement and separating condensate from the gas at Marine's plant, **[1694]** and for performing all other services provided for hereunder exclusive of compression, shall be as follows:

As used herein the words "excess gas" shall mean the

quantities of gas gathered hereunder in excess of the first 62,500 MCF of gas per day.

(a) For the first 62,500 MCF of gas per day, whether received from dedicated leases in fields now connected to Marine's gathering system or new fields hereafter connected — four cents (4c) per MCF.

(b) For all excess gas received from dedicated leases in fields now connected to Marine's gathering system — three cents (3c) per MCF.

(c) For all excess gas received from dedicated leases in new fields hereafter connected to Marine's gathering system, the rate per MCF of gas per day set forth in the Gas Table annexed hereto as Exhibit "B" which is applicable to the respective field from which such gas is produced.

The total quantity of gas gathered hereunder during the respective billing periods shall be determined from the meter of Marine at the Marine delivery point for gas. Such total quantity shall be allocated between the **[1695]** respective fields from which deliveries are made on the basis of the respective meters of Pure for such fields at Pure delivery points or the Pure measuring and testing points, and the respective meters of other operators for the respective fields from which gas and condensate commingled with gas and condensate delivered hereunder has been produced and received into Marine's gathering system. The daily quantities gathered during the respective billing period shall be the daily average of the total quantity gathered during such billing period, and the daily quantities gathered from the respective fields shall be the daily average of the portion of the total quantity gathered hereunder which is allocated to such field.

Section 8. *Taxes:* Pure shall pay all Federal and State of Louisiana production, severance, gathering and similar taxes which are now or may hereafter be levied or assessed in respect of or applicable to the gas and condensate gathered hereunder, and all new or additional or increased taxes which may be so levied or assessed, provided, however, that if Marine operates a processing plant under the provisions of Section 11(c) hereof, Marine shall pay its pro rata share of all taxes on condensate [1696] and all other products so derived from such processing plant. If any of the taxes to be paid by either of the parties hereunder are paid by the other party, then the party paying the tax shall be entitled to reimbursement for the amount thereof. The amount for which reimbursement is to be made by either party to the other may be billed monthly or at the end of each calendar year, payment to be made twenty (20) days after billing.

Section 9. *Billing and Payment:* For the purpose of billing and accounting for gas and condensate delivered hereunder, the day shall begin at 7:00 A.M. and extend to 7:00 A.M. of the following day, and the calendar month shall begin at 7:00 A.M. on the first day of the calendar month and extend to 7:00 A.M. of the first day of the next succeeding calendar month. Settlement shall be made by check for all gas gathered during any calendar month, and for any other accounts payable, on or before the twentieth (20th) day of the next succeeding calendar month.

On or before the 10th days of each month Pure and Marine shall render to the other, and in addition shall render to third parties as they may be directed by the other party a statement showing the amount of gas and con- [1697] densate measured by each at their respective delivery or measuring and testing points during the preceding month, with sufficient information to explain and

support any adjustments made in determining the amount of gas and condensate measured.

Section 10. *Term:* This contract shall be in force from its date, and for a term commencing at 7:00 o'clock A.M. on its effective date as provided in Section 19 hereof, to 7:00 A.M. on March 1, 1971.

Section 11. *Separation and Processing Plants:*

(a) Pure shall separate the gas and condensate and free water and, after recombining the gas and condensate deliver the same to the Marine gathering system at the Pure delivery points. Marine agrees to erect, install, maintain and operate at Marine's sole cost, risk and expense, in connection with its gathering system, a plant to mechanically separate the condensate from the gas delivered hereunder, and Marine will redeliver to Pure, free of cost and expense to Pure, in storage to be furnished by Pure at Pure's expense, all of the condensate so recovered. Marine will at its expense install and operate such dehydrating equipment as may be required to enable Marine to [1698] comply with its obligation under Section 3 hereof to dehydrate such gas. In the event the gas and condensate, or either of them, gathered by Marine hereunder is commingled with gas and condensate, or either of them, gathered or purchased by Marine from others, the amount of condensate attributable to Pure's gas shall be equal to that proportion of Marine's total plant condensate production that the total metered condensate volume plus the liquid content of the gas of Pure (determined as provided in paragraph (m) of Section 4 hereof) bears to the metered volumes of all condensate received by Marine plus the liquid contents of all gas so determined and received by Marine. Marine's mechanical seperation plant shall be of such a character and design to *recover as much, if not more condensate as*

Pure has separated from its gas and recombined with said gas before delivery to Marine. Marine's mechanical separation plant shall be operated by Marine at its maximum efficiency within the limits of the equipment installed. Marine agrees to provide, free of cost to Pure, at or adjacent to Marine's plant site, a location upon which Pure may erect and maintain storage facilities, with capacities totaling up to **[1699]** thirty-five thousand (35,000) barrels of condensate. In the event the method of allocating condensate between Pure and other parties should for any reason become inequitable to Pure or to such other parties, Marine will cooperate with Pure in endeavoring to amend this agreement and the agreements with such other parties so as to provide for more equitable method of allocation.

(b) Pure reserves and shall have the right, at Pure's election, cost and expense to erect, maintain and operate or cause to be erected, maintained and operated, a plant connected with Marine's system at any point selected by Pure, for the processing of gas delivered hereunder, and Pure shall retain all of the products derived from any such processing of the gas attributable to Pure, provided any such gas shall, if redelivered to Marine by Pure, after processing by Pure, meet the minimum requirements set forth in Section 3 and 5 hereof, and Marine shall not enter into any contract relative to gas purchased or acquired by Marine from others and commingled by Marine with gas delivered by Pure to Marine hereunder which contract will restrict or prevent Pure from entering into a contract with others whose **[1700]** gas is so commingled with that delivered by Pure to Marine hereunder, for the processing of such commingled gas.

(c) Marine may, with the consent of the subject to the approval of terms and conditions by Pure, install or cause to be installed a plant to process the gas delivered

hereunder after such gas has been processed in Marine's mechanical separation plant, in which event Pure shall receive one-half ($\frac{1}{2}$) of the net proceeds derived from the products so recovered.

Section 12. *Extension of Gathering System:* The leases of Pure which are and shall be subject to this agreement are those now held which are described in Exhibit "A" hereto annexed and made a part hereof, and those in which interests are hereafter and during the term hereof acquired by Pure which cover areas situated in any field (as the word "field" is hereinafter in this Section 12 defined) containing leases dedicated hereunder within the Gulf of Mexico Field. Whenever Pure shall obtain additional lease interests in any such field, it shall advise Marine thereof in writing and the parties shall execute an amendment to Exhibit "A" describing said lease interests and the area in which the same are held. The execution [1701] of such amendment shall not, however, be a condition precedent to the effectiveness of the dedication herein made. Pure dedicates to the performance of this agreement all gas and condensate in and under and produced from the reserves attributable to Pure's interest in each and all of such leases. Such leases shall, however, be subject to Pure's right to release of such of said leases and reserves which Marine may become obligated to release under this Section 12, or which are otherwise released under the terms of this section.

It is agreed, however, that if Leases Nos. 7, 8, or 9 described in Exhibit "A", are by Pure made subject to pooling, unitization or joint development agreements which also cover the leases of others on the same structure, as to all of the gas and condensate rights under the areas covered by such leases, or any portion thereof, and Pure's participation under such agreement is less than fifty per cent (50%) and the other parties thereto are unwilling for the gas and

condensate rights of Pure subject to such pooling, unitization or joint development agreement to remain subject to this agreement, then the interest of [1702] Pure which are subject to such pooling, unitization or joint development agreement and the gas and condensate attributable thereto shall be released from this agreement and dedication hereto. Pure shall give written notice to Marine of the existence of such pooling, unitization or joint development agreement and the written statement of such other parties of the unwillingness of the other parties thereto to Pure's interests remaining subject to this agreement, and thereupon such interests shall be released from this agreement without any act by Marine being required.

Notwithstanding any provisions of this agreement or of this Section 12 to the contrary, if under the terms or provisions of any agreement or lease under which any lease or lease interests were acquired by Pure after March 15, 1950, such leases or lease interests are prohibited from dedication hereunder, such leases and lease interests and the gas and condensate attributable thereto shall not be or become subject to this agreement. There are also excepted from dedication hereunder the interest of Pure under the leases in the Creole Field which are described and referred to under the letter agreement between Pure and Marine dated March 22, 1950.

[1703]

For the purposes of this Section 12 "field" shall mean a geological structure. Reserves of any field are to be the sum total of the reserves in all reservoirs associated with such geological structure. "Reserves" shall include all proven reserves.

In the event Pure discovers or develops a new field and the recoverable reserves within such field and attributable

to the lease interest of Pure which are dedicated to the performance of this agreement, are within the limits of any of the quantities shown in Exhibit B hereto annexed in the column headed "Recoverable Gas Reserve In Billion Cubic Feet", either initially or at any time after the drilling of development wells, Marine shall be obligated to build or extend its gathering system five (5) miles for each fifty billion cubic feet of such recoverable reserves of Pure, not to exceed, however, a total distance of thirty (30) miles from shore. The distance of any such extension shall be the shortest straight line between the proposed delivery point in the new field and the accepted shore line. If any such new field of Pure is at a distance beyond the limit of Marine's obligation to build or extend its gathering [1704] system, then Pure shall have the option of paying Marine the full cost of any excess length of line. If Pure does not elect to pay Marine for the full cost of any excess length of line, Marine shall have the option, for a thirty (30) day period, to pay for such excess line and failing to do so, shall release from this agreement the dedicated reserves of gas and condensate from such new field. Upon such release the lease interests in such field and the gas and condensate attributable thereto shall no longer be subject to this agreement.

Marine agrees that within one hundred eighty (180) days after the determination of the gas reserves, attributable to the interest of Pure in a new field dedicated hereto under the foregoing provisions of this Section and the election of Pure, or of Marine, to bear the cost of the excess length of line, if any, Marine will complete the installation of the additions or extension of its gathering system and mechanical separation plant required to render service hereunder to such new field.

The determination of the total quantity of recoverable

proved gas and condensate reserves of Pure originally in place with respect to such interests in such new field **[1705]** shall be made by mutual agreement from time to time upon the request of either party to the other, but not more often than once each year, and, if they are unable to agree, then such determination shall be made by arbitration. Pure agrees to make available to Marine, or to the arbitrators, all geological well and reservoir data and information in its possession or in possession of the operator of such field relating to such field. As used herein the phrase "originally in place" shall mean originally in place on the date of the initial delivery of gas and condensate from such field. As used herein the phrase "recoverable proved" shall mean the reserve proved by the wells then drilled and recoverable from said wells, calculated to atmospheric abandonment in the reservoir and computed at the pressure base at the time applicable under Subsection (c) of Section 4 hereof.

Section 13. *Warranty and Indemnity.* Pure warrants title to all gas and condensate delivered hereunder, that it has the right to deliver the same, and that such gas and condensate are free from liens and adverse claims of every kind and agrees to indemnify and save Marine harmless against all loss, damage and expenses of every character on account of royalties, overriding royalties, payments out of production, taxes and other payments or charges on the gas and condensate **[1706]** applicable before or upon delivery to Marine (other than taxes payable by Marine hereunder), and also on account of any and all liens and adverse claims asserted against such gas and condensate. It is agreed, however, that Marine shall make no claim or demands upon Pure hereunder for or on account of the loss of any investment or for any expenditures made by Marine in performance of its obligations hereunder, by

reason or on account of any such prior lien or adverse claim.

Pure agrees that it will pay all royalties, overiding royalties, payments out of production and like charges on all natural gas and condensate delivered hereunder.

In the event of assertion of any claims against Marine on account of liens or adverse claims or charges of any kind, Pure will make available for use by Marine in defending such claims all title information and date and instruments affecting title in Pure's possession which relate to the applicable lease or leases and the gas and condensate produced therefrom.

Marine agrees that the gas and condensate gathered by it hereunder will be redelivered to or for the account of Pure free and clear of liens created by Marine or which may arise by reason of any operations carried on **[1707]** by Marine which it may be obligated or permitted to carry on under the terms of this agreement, save and except, however, such liens or claims as Marine may have or be entitled to assert by reason of any failure on the part of Pure to perform its obligations under this agreement.

Section 14. *Easements and Responsibility for Gas and Condensate:*

(a) Marine shall, in so far as Pure is able to convey such rights, have an easement and servitude on the areas subject to Pure's leases for the purpose of installing, operating and maintaining Marine's gathering system and related facilities and equipment, with the right to remove the same before, or within a reasonable time after, the expiration of this contract; and, Marine shall at all reasonable times have the right to free access to any part of Pure's leasehold and appurtenances thereon for any pur-

pose connected with any matter or thing covered by this contract.

(b) As between the parties hereto, Pure shall be in exclusive control and possession of the gas and condensate deliverable hereunder until delivered to Marine's gathering system, and until so delivered shall be solely **[1708]** responsible for any and all injury (including death) or damage to persons or property, other than to employees or property of Marine caused thereby. After delivery to Marine, Marine shall be deemed to be in exclusive control and possession of said gas and condensate and shall be solely responsible for any and all injury (including death) or damage to persons or property, other than to employees and property of Pure, caused thereby, after delivery by Marine to Pure of condensate removed by Marine from the gas of Pure, Pure shall be in exclusive control and possession of said condensate and shall thereafter be solely responsible for any and all injury (including death) or damage to persons or property, other than to employees or property of Marine, caused thereby.

It is agreed, however, that Marine shall not be responsible or accountable in any way to Pure for gas or condensate delivered hereunder, except for gas used as fuel in plant operations and gas and condensate lost by reason of negligence on the part of Marine or vented by Marine solely because of the operating requirements of its gathering system and other facilities. In no event shall Marine be obligated to account for gas vented or lost by reason of any occurrence which constitutes a force majeure hereunder, **[1709]** or pursuant to any request or requirements of Pure or Tennessee or other purchaser of gas from Pure.

Section 15. *Operations of Pure:* Pure agrees to drill a sufficient number of wells, at Pure's expense, and to keep

its well in good condition to deliver the contract quantity of gas under the aforementioned Marine-Tennessee Agreement and hereunder; provided, however, in performing this covenant and the provisions of Section 2 hereof Pure shall in no event be required to do more than a reasonably prudent operator would do under the same or similar circumstances in order to reasonably develop Pure's leases for the recovery of the gas reserves therein, or to drill or rework any well solely for the purpose of increasing or maintaining deliverability under said Marine-Tennessee Agreement or hereunder if in Pure's opinion, reached in good faith, such well, if drilled or reworked would not be productive in quantities sufficient to recover the cost of drilling and reworking operations, operating the well and a reasonable profit thereon. Pure shall also have the right to abandon or surrender any well or lease which in Pure's opinion, reached in good faith, is not capable, or if theretofore productive, has ceased to be capable of producing gas and con-
[1710] densate, or either of them, in paying quantities, and such leases so abandoned or surrendered shall cease to be dedicated hereunder. Pure shall also have the right to use gas produced from any leases for developing and operating Pure's leases in the Gulf of Mexico Field, and the right to operate its properties free from any control by Marine and in such manner as Pure, in its sole discretion, may deem advisable, including, without limitation, each and all of the foregoing rights and also the right to drill new wells, to repair and rework old wells. Pure agrees, however, that in exercising the foregoing rights, it will act as a reasonably prudent operator would act under similar circumstances.

Section 16. *Regulatory Bodies:* This contract shall be subject to all valid applicable State and Federal laws, and orders, directives, rules and regulations of any governmental body or official having jurisdiction.

Section 17. *Force Majeure:* If either Marine or Pure is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control, to perform or comply with any obligation or condition of this contract, upon giving notice and reasonably full particulars to the other parties such obligation or condition **[1711]** shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period: provided, obligation to make payments then due for gas and condensate delivered hereunder shall not be suspended, and the cause of suspension (other than strikes and lockouts) shall be remedied so far as possible with reasonable dispatch. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty. The term "force majeure" shall include, without limitation by the following enumeration, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes and any other industrial, civil or public disturbance, inability to obtain materials, failure of carriers to transport or furnish facilities for transportation, rules and regulations with regard to transportation by common carrier, floating equipment, supplies or permits or failure of gas supply, and any laws, orders, rules, regulations, acts or restraints of any government or governmental body or authority, civil or military, and also the failure of any purchaser of gas from Pure to take gas because of any event or occurrence of the character here- **[1712]** in defined as constituting a force majeure.

Section 18. *Arbitration:* Each controversy between Marine and Pure concerning matters relating to a determination of recoverable reserves or the quantity or quality of gas and condensate delivered or tendered hereunder, or to measurements and tests thereof, or matters of accounting.

shall be submitted to arbitration by a board of three arbitrators (who shall act as amicable compounders) upon the written request of Marine or of Pure, which request shall name one arbitrator. The party receiving such notice shall within ten (10) days thereafter, by notice to the other, name the second arbitrator, or, failing to do so, the second arbitrator shall be appointed by the judge senior in service of the United States District Court for the Southern District of Texas upon request of any party involved. The two (2) arbitrators so appointed shall name the third, or failing so to do within ten (10) days, the third arbitrator may be appointed by said senior judge.

The arbitrators so appointed shall promptly hear and determine the questions submitted, after written notice to the parties of the time and place of the hearing, at which each party shall be entitled to be heard, and [1713] shall render their decision within sixty (60) days after appointment of the third arbitrator. If within said period a decision is not rendered by the board or a majority thereof, new arbitrators may be named and shall act hereunder at the election of either Marine or Pure in like manner as if none had been previously named: provided, however, that if the matter submitted to arbitration concerns a lease or leases containing recoverable proved reserves or alleged recoverable proved reserves dedicated hereunder but not connected to Marine's gathering system and if said lease or leases will expire of their own primary term within ninety (90) days or less after the end of the sixty (60) day arbitration period above provided, then failure of the arbitrator to render a decision shall vest in Pure the option, upon written notice to Marine, of removing from dedication hereunder each such expiring lease. All expenses of arbitration hereunto shall be shared equally by the parties hereto.

Section 19. *Waiver, Notices, Assignment and Miscellaneous:* (a) No waiver by Marine or Pure, of any default of the other under this contract, shall operate as a waiver of any future default, whether of a like or a different character.

(b) Every notice, request, statement or bill provided for in this contract shall be in writing directed to the party to whom given, mailed or delivered to it at its post office addresses as follows:

Marine: The Marine Gathering Company
Texas National Bank Building
Houston 2, Texas.

Pure: The Pure Oil Company
P. O. Box 239
Houston 1, Texas.

or at such other post office address as any party shall from time to time designated as its address for such purpose by registered letter addressed to the other parties.

(c) This agreement shall bind and inure to the respective successors and assigns of the parties hereto but no assignment shall relieve Pure of its obligations to Marine unless the assignee of Pure, in writing delivered to Marine, assumes and agrees to perform all of Pure's obligations hereunder in so far as relates to the interest in dedicated reserves, and gas and condensate attributable thereto, covered by the assignment.

(d) This agreement will be and become effective as between the parties whenever appropriate orders have been entered by the Federal Power Commission granting the

necessary authority, consent or certificates of public [1715] convenience and necessity authorizing the respective parties to this agreement and to the agreement of even date herewith between Marine, Pure and Tennessee entitled "Agreement Relating To Contracts", to do and perform all acts and things necessary to perform their respective obligations under said agreements, upon and containing terms and conditions satisfactory to said respective parties.

The effective date and time of this agreement will be 7:00 o'clock A.M. on the first day of the first calendar month after the date shown on page 1 hereof, if made so effective by such order of the Federal Power Commission and provided also that said Agreement Relating To Contracts is made effective by such or another order of said Commission at the same date and time, or the effective date of this agreement shall be at 7:00 o'clock A.M. on such later date as said order or orders of said Commission may make this agreement and said Agreement Relating To Contracts effective, or if said order or orders do not make said agreements effective on one or the other of said dates, this agreement and said Agreement Relating To Contracts shall be effective at 7:00 o'clock A.M. on the first day of the calendar month following the date [1716] upon which said order or orders, or the last thereof issued, becomes final. In the event it becomes unnecessary in law to obtain such order or orders of the Federal Power Commission this agreement shall be effective at 7:00 o'clock A.M. on the first day of the first calendar month following determination by agreement of the parties or by arbitration hereunder that such order or orders are unnecessary.

IN WITNESS WHEREOF, this contract is executed in two (2) counterparts, each of which shall be an original, this 2nd day of January, 1957.

THE MARINE GATHERING COMPANY

By /s/ G. Burton Liese
President

(S E A L)

Attest:

/s/ Howard M. Temple
Secretary

THE PURE OIL COMPANY

By /s/ Chase E. Sutton
Agent and Attorney-in-Fact

(S E A L)

Attest:

/s/ J. O. Harper
Asst. Secretary

[1717]

EXHIBIT "A"

1. State Lease No. 870, OCS No. 0203, covering all of Block 23, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 385, Entry No. 90797, Records of Vermilion Parish, Louisiana.

2. State Lease No. 878, OCS No. 0204, covering the South Half of Block 38, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 395, Entry No. 90802, Records of Vermilion Parish, Louisiana.

3. State Lease No. 879, OCS No. 0205, covering the North Half of Block 38, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 397, Entry No. 90803, Records of Vermilion Parish, Louisiana.

4. State Lease No. 880, OCS No. 0206, covering the North Half of Block 39, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 399, Entry No. 90804, Records of Vermilion Parish, Louisiana.

5. State Lease No. 882, OCS No. 0207, covering the West Half of Block 42, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 403, Entry No. 90806, Records of Vermilion Parish, Louisiana.

6. State Lease No. 1091, OCS No. 0208, covering the East Half of Block 42, Vermilion Area, dated June 19, 1947, and recorded in Conveyance Book 193, Page 221, Entry No. 92404, Records of Vermilion Parish, Louisiana.

7. State Lease No. 1126, OCS No. 0216, covering the Southeast Quarter of Block 39, West Cameron Area, dated July 18, 1947, and recorded in Conveyance Book 65, Page 319, Entry No. 52187, Records of Cameron Parish, Louisiana.

8. State Lease No. 1142, OCS No. 0219, covering the Northeast Quarter of Block 62, West Cameron Area, dated July 18, 1947, and recorded in Conveyance Book 65, Page 329, Entry No. 52192, Records of Cameron Parish, Louisiana.

9. State Lease No. 1438, OCS No. 0220, covering the South Half of Block 99, West Cameron Area, dated May 10, 1948, and recorded in Conveyance Book 68, Page 297, Entry No. 53808, Records of Cameron Parish, Louisiana.

3. State Lease No. 879, OCS No. 0205, covering the North Half of Block 38, Vermilion Area, dated November 26, 1946, and recorded in Conveyance Book 186, Page 397, Entry No. 90803, Records of Vermilion Parish, Louisiana.

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9. State Lease No. 1438, OCS No. 0220, covering the South Half of Block 99, West Cameron Area, dated May 10, 1948, and recorded in Conveyance Book 68, Page 297, Entry No. 53808, Records of Cameron Parish, Louisiana.

in his absence or in the case of his being indisposed, where time is of the essence, the Vice-President, Robert C. Ledford, be and they hereby are authorized, empowered and directed to execute, or cause to be executed, in the name and behalf of this Company, and to file, or cause to be filed, with the Federal Power Commission, Washington 25, D.C., applications for certificates of public convenience and necessity in the form prescribed by the Federal Power Commission, and the Secretary of this Company be, and he hereby is, authorized and directed to affix the seal of this Company to said applications and attest the same, if necessary; and further

RESOLVED, that G. Burton Liese or Robert C. Ledford be and they hereby are authorized to sign said applications, and all instruments necessary or incidental in connection therewith, and to file the same with the Federal Power Commission, Washington 25, D.C., and to do and perform in the name and on behalf of this Company, every act whatsoever requisite or necessary to be done in the premises.

I do further certify that said resolution has not been in any wise amended, annulled or rescinded and that the same is in full force and effect at the date hereof.

WITNESS my hand and the seal of said corporation this 31st day of July, A.D., 1958.

/s/ Howard M. Temple
Howard M. Temple

[1720]

The foregoing Certificate was subscribed and sworn to before me this 31st day of July, 1958.

/s/ Dorothy Q. Rich
Notary Public in and for Harris County, Texas

My Commission Expires June 1, 1959

[1721]

STATE OF TEXAS }
COUNTY OF HARRIS }

The undersigned, G. Burton Liese, having been first duly sworn, deposes and says that he is President of Commonwealth Oil Company, the applicant named in the foregoing application, that he has executed the within application for and on behalf of the applicant, that he is familiar with said application and the contents thereof and that, to the best of his knowledge, information and belief, the facts set forth therein are true.

/s/ G. Burton Liese
G. Burton Liese

Sworn to and subscribed before me this 31st day of July, 1958.

/s/ Dorothy F. Rich
Notary Public in and for Harris County, Texas

My Commission Expires June 1, 1959

[1722]

BILL OF SALE AND AGREEMENT

THIS BILL OF SALE AND AGREEMENT, made as of the 1st day of September, 1955, by and between The Marine Gathering Company, a Delaware corporation (hereinafter referred to as "Marine"), and Commonwealth Oil Company, a Florida corporation (hereinafter referred to as "Commonwealth"),

WITNESSETH:

WHEREAS, at a meeting of the Board of Directors of Marine duly called and held on the 1st day of September, 1955, there was declared a dividend out of the retained earnings of Marine payable in properties, such dividend to be effective as of said date and to be distributed to Commonwealth as the holder of the common stock of Marine; and

WHEREAS, the properties to be delivered and transferred as such dividend were to consist of the real estate, the gathering and related facilities of Marine in the Rollover Field, offshore of and in Cameron and Vermilion Parishes, Louisiana, the tangible personal property of Marine, and certain other assets and properties, all as described in the resolutions adopted at said meeting, and as hereinafter set forth in this Agreement; and

WHEREAS, by manual or other delivery and/or instruments of assignment and transfer, and other documents delivered heretofore or contemporaneously herewith Marine has assigned and transferred unto Commonwealth, as of September 1, 1955, certain of the other property and assets of Marine constituting a part or portion of such dividend; and

[1723]

WHEREAS, Marine desires to make certain that Commonwealth shall acquire as of the aforesaid date all of the properties and assets of Marine of whatsoever character and wheresoever situated intended to be transferred under and pursuant to the terms of such dividend so declared by the Board of Directors of Marine, and by this Agreement and Bill of Sale Marine intends to assign and transfer to Commonwealth, its successors and assigns, all of the property and assets of Marine which are not or have not heretofore been transferred, assigned and conveyed to Commonwealth by specific deeds or instruments of transfer or acts of transfer as aforesaid;

NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars ($10) lawful money of the United States of America and other valuable considerations, the receipt whereof is hereby acknowledged, and in consideration of the covenants and agreements of Commonwealth herein contained, Marine has assigned and transferred, and by these presents does assign and transfer to Commonwealth, its successors and assigns, all of the property and assets of Marine other than the following:

(i) Cash on hand or in banks;

(ii) Marine's gas purchase and gas sales contracts relating to the purchase and sale of gas in the Rollover Field, offshore and in Cameron and Vermilion Parishes, Louisiana;

(iii) All marketable securities owned by Marine;

(iv) Accounts receivable of Marine outstanding on September 1, 1955; and

(v) Automobiles, trucks or other motor vehicles;

(1723)

policies of insurance and fidelity bonds and any rights or claims arising thereunder.

Without intending thereby to limit the generality of the foregoing description of the properties and assets so conveyed, assigned and transferred from Marine to **[1724]** Commonwealth, there are expressly described the following properties and assets intended hereby to be so transferred, assigned and conveyed from Marine to Commonwealth, to-wit:

(a) All interest of Marine in the properties and other assets of the joint venture operating under and standing in the name "Dela Oil Company", wheresoever situated:

(b) All supplies, stock on hand and materials, all stationery and other supplies, all office furniture and fixtures, all machinery, tools, and equipment and appliances of every kind and nature, whether in the possession of Marine or in transit, or in the possession of any other person, firm or corporation; and

(c) If and to the extent that the same has not been assigned or transferred effectively by separate instruments of assignment or transfer or by manual delivery, all claims, tax refunds or claims therefor, claims for abatement of taxes, demands, rights, equities and choses in action, and the proceeds thereof; all books of account, records, files, papers and documents; all muniments of title to and evidences of ownership of Marine (except to the properties expressly excepted from the terms of this conveyance as set out above); and all other personal property, whether tangible or intangible, of every nature and wheresoever situated except as aforesaid).

Commonwealth, by its execution hereof, agrees to assume and hereby does assume and agree to pay all of the debts, liabilities, and obligations hereinafter set forth, to-wit:

(I) All accounts payable of Marine existing on September 1, 1955, and set out and listed on Schedule A hereto annexed;

(II) The notes payable of Marine outstanding on September 1, 1955, and set out and listed on Schedule A hereto annexed; and

(III) All other liabilities, debts and obligations whatsoever of Marine outstanding and in existence on September 1, 1955, absolute or contingent, save and except only any and all liabilities and/or reserves of Marine for and in respect to Federal and state income taxes and state of Louisiana gas gathering taxes.

This instrument shall be binding upon and shall inure to the benefit of the respective successors and assigns of the parties hereto.

[1725]

IN WITNESS WHEREOF, the parties hereto have duly caused this instrument to be executed and delivered as of the date above specified.

ATTEST:	THE MARINE GATHERING COMPANY
???	By: John H. Blaffer
Asst. Secretary	Chairman of the Board
ATTEST:	COMMONWEALTH OIL COMPANY
???	By: G. Burton Liese
Secretary	President

THE STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared John H. Blaffer, Chairman of the Board of The Marine Gathering Company, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity above stated and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 19th day of September, 1955.

(Signed) Nita Ferguson
Notary Public in and for
Harris County, Texas

THE STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned authority, on this day personally appeared G. Burton Liese, President of Commonwealth Oil Company, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity above stated and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 19th day of September, 1955.

(Signed) Nita Ferguson
Notary Public in and for
Harris County, Texas

[1726]

SCHEDULE "A"

Accounts Payable
September 1, 1955

Vendor	Description	Amount
Attwell & Company	Endorsement—Ford Sedan $	79.69
J. L. Pugg Company	Calibration of Meters	208.40
Capital City Hardware	Supplies	195.87
Cathodic Protection	Repairs	950.00
Clarke & Courts	Office Supplies	7.38
Classified Parking System	Car Storage	35.00
Continental Drug	Films	.63
Cork Club	Dues	15.00
Corpus Christi Transportation Co.	Lease—2 autos	180.00
Ralph E. Fair	Operating Expense—Hagist	150.31
Dunhill	Gift	17.96
Fawvor's Boat Service	Line maintenance	83.13
Grebe & Doremus	Tool house	600.00
Gulf Oil Corp.	Gasoline—autos	153.75
Gulf Oil Corp.	Gasoline—pump	45.56
Higham's Cadillac Co.	Repairs	37.35
Hotel St. Regis	Entertainment	9.95
Max H. Jacobs Agency	Publicity	168.66
Jamail Bros.	Supplies	60.51
Jack & Charlie's	Entertainment	42.88
Jefferson Davis Electric Coop.	Electric Service	29.50
Kreiter Industrial	Supplies	59.89
Liberty Builders	Tear down and re-erect house	6,151.50
Houston Oil Field Material	Supplies	7.69
McCutchen Construction	Maintenance—station	113.50
Humble Oil & Refining	Gasoline—autos	85.54
Mid-Continent Supply	Supplies	39.53
Mid-Continent Supply	Supplies	3.52
Montrose Home Remodeling Co.	Supplies	9.36
Montrose Stores	Supplies	9.74
National Supply Co.	Maintenance	6.00
Oil and Gas Building	Electric Service	6.01
Phillips Petroleum Co.	Gas purchases	102,001.36
Photo-Lith Company	Supplies	22.00
Petroleum Club	Entertainment	20.00
Pure Oil Company	Line maintenance	9.30

Vendor	Description	Amount
Pure Oil Company	Condensate loss due to Venting	913.50
Pure Oil Company	Gas purchases	88,523.99
Refinery Supply	Supplies	5.88
Raymond Richard	Labor	10.50
San Jacinto Club	Dues and services	32.00
Service Truck Line	Hauling pipe—new station	1,010.01
Sheffield, Garrett and Carter	Accounting	215.00
Sherry Netherland	Entertainment	15.60
Southwestern Bell Telephone	Long distance & local service	311.56
Southwestern Bell Telephone	Moble telephone—Beaumont	40.43
Southwestern Bell Telephone	Mobile telephone—Houston	43.57
Southern Bell Telephone	Louisiana calls	31.63
Sudie Gregg	Purchase of 5 acres—Brazoria	1,000.00
Southern Blue Print	Photostats	11.25
Gaylord Stickle Co.	Administration expense	110.75
Tennessee Gas Transmission	Expenses connected with purchase of Lake Arthur Plant site	2,003.00
	[1727]	
Troubadour Club	Entertainment	59.85
Webwood	Flowers	15.00
Western Union	Message	1.71
Wilson Stationery Co.	Supplies	32.34
Andrew Jackson Wray	Insurance—Outboard motor boat	56.82
W-K-M	Supplies	88.74
Wrecking Corp. of America	"Package House" Brazoria City	1,032.50
		$207,182.10

[1728]

SCHEDULE "A"

Notes Payable as of September 1, 1955

Date of Note	Payee	Original Principal Amount	Unpaid Balance
12/11/50	Texas National Bank	$350,000	$105,000
7/ 8/53	Texas National Bank	400,000	240,000
10/15/53	Texas National Bank	150,000	96,000
	Total unpaid balance		$441,000

[1729]

THE STATE OF TEXAS }
COUNTY OF HARRIS }

THIS AGREEMENT entered into as of the 1st day of September, 1955, between Commonwealth Oil Company, a Florida corporation (hereinafter called "Lessor"), and The Marine Gathering Company, a Delaware corporation (hereinafter called "Lessee"),

WITNESSETH:

I.

Lessor, in consideration of the covenants and agreements set out herein to be kept and performed by Lessee, has leased, demised, and rented, and by these presents does lease, demise and rent unto Lessee, Lessor's certain pipe line and gathering facilities and appurtenant and related facilities situated in and offshore from the Parishes of Vermilion and Cameron, State of Louisiana, and serving the Rollover Field offshore of said Parishes, together with all appurtenances thereto, the leased premises being more particularly described as follows, to-wit:

(1) The 8⅝ inch OD high pressure natural gas gathering line, beginning at a point where said pipe line connects with the Tennessee Gas Transmission Company's shore pipe line situated just west of the Rollover Bayou in Vermilion Parish, State of Louisiana and extending out under the coastal waters of the Gulf of Mexico in a straight line for a distance of approximately 8.44 miles on a bearing of South 3° 30′ East to a point terminating on the offshore drilling platform "A" of The Pure Oil Company located in the Rollover Field in the Gulf of Mexico which pipe line is designated Lessor's Rollover Line No. 1;

(2) The $10\frac{3}{4}$ inch OD high pressure natural gas gathering pipe line beginning at [1730] a point on Tennessee Gas Transmission Company's shore pipe line situated just west of the Rollover Bayou in Vermilion Parish, State of Louisiana, and extending out under the coastal waters of the Gulf of Mexico in a straight line (and parallel and adjacent to Lessor's $8\frac{5}{8}$ inch OD high pressure natural gas gathering line which connects with The Pure Oil Company's platform "A") for a distance of $9\frac{1}{2}$ miles to a point terminating on the off-shore drilling platform "A" of the Phillips Petroleum Company and Kerr-McGee Oil Industries, Inc., located in the Rollover Field in the Gulf of Mexico which pipe line is designated Lessor's Rollover Line No. 2;

(3) The 6-inch OD high pressure natural gas gathering pipe line one and one-half miles in length located in Blocks 38 and 39 in the Rollover Field in the Gulf of Mexico off the coast of Vermilion Parish, State of Louisiana, which connects The Pure Oil Company's offshore platform "B" with The Pure Oil Company's offshore platform "A", which pipe line is designated Lessor's Rollover Line No. 3;

(4) The 10-inch OD high pressure natural gas gathering pipe line approximately one mile in length located under the coastal water of the Gulf of Mexico in Block 39 off the coast of Vermilion Parish, State of Louisiana, extending from said The Pure Oil Company's off-shore platform "A" to the Phillips Petroleum Company-Kerr-McGee Oil Industries, Inc., offshore platform "A", which pipe line is designated Lessor's Rollover Line No. 4;

(5) All the tracts or parcels of land, together with

the buildings and structures thereon and appurtenances thereto, owned by Lessor in Cameron Parish, State of Louisiana, including but not limited to, the following described tract or parcel of land situated in said Cameron Parish, together with all buildings, machinery, gas pipe lines, compressors, equipment and appliances situated on said land, and also including all equipment, appliances, and appurtenances of every kind or nature whatsoever used or for use as part of such properties, to-wit:

A tract of land beginning at the intersection of the north line of the State Highway No. 292 with the West line of the public road running in a northeasterly direction from said State Highway No. 292 to North Island, which said point is in the south half of the northeast quarter of Section 25 in Township 15 south, Range 4 west, Louisiana meridian;

THENCE from said point of [1731] beginning, running in a northeasterly direction along the said west line of the said North Island Road a distance of 350 feet; THENCE in a northwesterly direction on a parallel line with the north line of said State Highway No. 292, a distance of 620 feet: THENCE, in a southwesterly direction on a parallel line with the said west line of the said North Island road a distance of 350 feet, to the said north line of said State Highway No. 292, THENCE in a southeasterly direction, following the said North line of said State Highway No. 292 a distance of 620 feet to the point of beginning.

The separator and dehydrator plant and associated equipment and facilities located on the real property immediately described above in Cameron Parish, Loui-

siana, together with any and all pipe, pressure gauges, Christmas trees, connections, fittings, valves, and all equipment and personal property of every kind and character whatever upon, connected with, or appurtenant to said real property, and the separators and dehydrators and associated equipment and facilities above described, now situated thereon, whether or not attached to the realty, together with all improvements now on said property.

The operator's residence and garage located on the said real property in Cameron Parish, Louisiana, together with the water well and pump adjacent thereto.

(6) All of that tract or parcel of land lying and being in the SE/4 of SE/4 Section 3 Township 13 South, Range 3 West, Cameron Parish, Louisiana, being more particularly described by metes and bounds as follows:

> Beginning at a point on the South line of a Parish Road, said point being located South 88 degrees 04 minutes West a distance of 16.5 feet from the intersection of the said South Line of the Parish Road and the East line of Section 3 in Township 13 South, Range 3 West; Thence from said point of beginning running South 0° 20′ West, a distance of 424.2 feet to a point for corner; Thence running South 88° 04′ west a distance of 513.5 feet to a point for corner; Thence running North 0° 20′ East a distance of 424.2 feet to a point for corner in the South line of the said Parish Road; Thence along the South line of the said Parish Road North 88° 04′ East a distance of 513.5 feet to the point of beginning, containing 5 acres, more or less.

Also, all existing pipe lines erected and maintained

on said property and all equipment and [1732] personal property of every kind and character placed thereon, and replacements to existing equipment, and improvements and all betterments thereto;

(7) Any and all pipe, pressure gauges, Christmas trees, connections, fittings, valves and all equipment and personal property of every kind and character whatsoever upon, connected with or appurtenant to, said property and gathering facilities above described in paragraphs (1) through (6) hereof.

Together with all rights, privileges, and appurtenances in anywise belonging, to the the above-described property, or any part thereof.

[1733]

TO HAVE AND TO HOLD unto Lessee all of the property above described (hereinafter referred to for convenience as the "leased premises"), subject to the further terms and provisions of this instrument.

II.

The term of this lease shall commence as of 7:00 o'clock A.M. on September 1, 1955 and shall continue in force, subject to the further provisions hereof, for an original term of twenty (20) years from said date, subject to renewal and extension as hereinafter provided.

III.

As consideration for the use of the leased premises during the continuance of this lease, Lessee shall pay Lessor, at Lessor's office in Houston, Harris County, Texas, on or before the *28th* day of each calendar month the sum of Thirty-one Thousand Two Hundred Fifty Dollars ($31,250) as rental for the preceding calendar month.

IV.

During the existence of this lease, Lessee shall pay all ad valorem taxes on the leased premises; provided, however, that nothing contained herein shall be construed as obligating Lessee to pay any portion of any federal or state income or other similar taxes levied upon Lessor by reason of its receipt of rental hereunder.

V.

Lessee covenants and agrees, at its expense, to keep and maintain the leased premises fully insured against loss by fire and explosion, and against such other hazards [1734] as Lessor may reasonably require, to the full value of the leased premises, in good and solvent insurance companies authorized to do business in Louisiana and acceptable to Lessor and, to transfer and deliver the policies and renewals of such insurance to Lessor. Lessee also agrees to keep the leased premises in good repair, and Lessor consents and agrees that, to the extent necessary, any insurance moneys received or receivable in connection with any destruction or loss to the leased premises may be paid to Lessee to reimburse it for the cost of any repairs or restorations of the leased premises in connection with any such loss or damage. All insurance policies shall be so endorsed or made payable that loss payable thereunder shall be to Lessor and Lessee as their respective interests may appear.

VI.

Lessor covenants and warrants that if Lessee performs the covenants and agreements on its part to be kept and performed under the provisions of this instrument, it shall have and enjoy quiet and peaceful possession and enjoyment of the leased premises for and during the existence of this lease.

VII.

Without the advance written consent of Lessor, Lessee shall not assign or sublet this lease or the leased premises, or any portion thereof.

VIII.

At the expiration of the primary term of this lease, Lessee shall have an option to renew the same for [1735] a further period of one (1) year and for additional one (1) year renewal periods for such length of time as may be reasonably necessary in order to comply with any and all applicable federal or state laws, statutes, rules or regulations. The rental to be paid during any such renewal period shall be the rental hereinbefore specified, and any such renewal period shall be automatically terminated as of the date that the above stated condition giving rise thereto shall terminate. Rental shall be adjusted appropriately for any fractional month of the term thereof.

IX.

Lessor shall not be liable to Lessee, its agents, servants, employees, customers, or visitors, or to any other persons whatsoever, for any injuries received on the leased premises during the existence of this lease, or for any damage to any goods or chattels of Lessee or any other party whomsoever on the leased premises, and Lessee will indemnify Lessor and hold it harmless against all injuries or damages so arising or arising in any manner out of the occupancy or use of the leased premises by Lessee.

X.

If default be made by Lessee in the payment of any installment of rent, or any part thereof, as and when due, or if Lessee shall fail to observe or perform any of the cove-

nants or conditions to be by it observed or performed under this agreement, then after thirty (30) days written notice from Lessor to Lessee, Lessee still being in default, Lessor may, at its election, declare this lease terminated and of no further force and effect, and may, [1736] either directly or through its representatives, re-enter the leased premises and remove all persons and property therefrom, with or without legal process and without prejudice to any of its other legal rights, using all necessary force for that purpose; and Lessee hereby, for itself and its successors and assigns, authorizes and ratifies such entry and removal and agrees to indemnify Lessor and hold it harmless against all loss, damage or expense on account of any such entry and renewal.

IN WITNESS WHEREOF, the parties hereto have duly caused this instrument to be executed all as of the date first above specified.

ATTEST:	THE MARINE GATHERING COMPANY
Clare A. Kessler Asst. Secretary	By: John H. Blaffer Chairman of the Board
ATTEST:	COMMONWEALTH OIL COMPANY
R. C. Ledford Asst. Secretary	By: G. Burton Liese President

WITNESSES:
Baine P. Kerr
Jacqueline Ehlers

[1737]

THE STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned notary public in and for Harris County, Texas appeared John H. Blaffer, to me personally known who, being by me duly sworn, did say that he is Chairman of the Board of The Marine Gathering Company, the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of the corporation by authority of its Board of Directors, and that John H. Blaffer acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Houston, in said County of Harris and State of Texas, this 19th day of September, 1955.

(Signed) Nita Ferguson
Notary Public in and for
Harris County, Texas

THE STATE OF TEXAS }
COUNTY OF HARRIS }

BEFORE ME, the undersigned notary public in and for Harris County, Texas appeared G. Burton Liese, to me personally known, who, being by me duly sworn, did say that he is President of Commonwealth Oil Company, the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of the corporation by authority of its Board of Directors, and that G. Burton Liese acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office at Houston, in said County of Harris and State of Texas, this 19th day of September, 1955.

(Signed) NITA FERGUSON
Notary Public in and for
Harris County, Texas

THE STATE OF LOUISIANA }
PARISH OF CAMERON }

OFFICE OF CLERK, 14th Judicial District Court

I HEREBY CERTIFY, That the above and foregoing is a true and correct copy of original filed for record the 6 day of October, 1955 Bearing title No. 72262 and recorded Book 109 of Conv. Page et seq.

In testimony whereof, witness my official signature and seal at Cameron, Cameron Parish, Louisiana, on this 6 day of October A. D., 1955.

(Signed) J. BENTON DOUGLAS
Clerk of Court

[1738]

THE STATE OF TEXAS }
COUNTY OF HARRIS }

KNOW ALL MEN BY THESE PRESENTS:

BE IT KNOWN that on this 19th day of September, 1955, before me, Nita Ferguson, a Notary Public in and for the County of Harris, State of Texas, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, came and appeared John H. Blaffer, Chairman of the Board of and herein representing

.... THE MARINE GATHERING COMPANY ....

a Delaware corporation, hereinafter sometimes referred to as "grantor", the said John H. Blaffer being duly authorized hereto, and personally came and appeared G. Burton Liese, President of and herein representing

.... COMMONWEALTH OIL COMPANY ....

a Florida corporation, the said G. Burton Liese being fully authorized hereto, and The Marine Gathering Company declared and acknowledged that, for and in consideration of the receipt by it from Commonwealth Oil Company of the sum of Ten Dollars ($10) in lawful money of the United States of America and other good and valid considerations, the receipt and sufficiency of which is also acknowledged, that it has granted, sold and conveyed, and does by these presents grant, sell and convey, unto Commonwealth Oil Company, to be effective as of 7:00 o'clock A.M. on September 1, 1955, the following described properties situated in the Parishes of Vermilion and Cameron in the State of Louisiana, and off the coast of the said Parishes in said State and in the Gulf of Mexico, to-wit:

[1739]

(1) The 8⅝ inch OD high pressure natural gas gathering line, beginning at a point where said pipe line connects with the Tennessee Gas Transmission Company's shore pipe line situated just west of the Rollover Bayou in Vermilion Parish, State of Louisiana and extending out under the coastal waters of the Gulf of Mexico in a straight line for a distance of approximately 8.44 miles on a bearing of South 3° 30′ East to a point terminating on the offshore drilling platform "A" of The Pure Oil Company located in the Rollover Field in the Gulf of Mexico which pipe line is designated grantor's Rollover Line No. 1;

(2) The $10\frac{3}{4}$ inch OD high pressure natural gas gathering pipe line beginning at a point on Tennessee Gas Transmission Company's shore pipe line situated just west of the Rollover Bayou in Vermilion Parish, State of Louisiana, and extending out under the coastal waters of the Gulf of Mexico in a straight line (and parallel and adjacent to grantor's $8\frac{5}{8}$ inch OD high pressure natural gas gathering line which connects with The Pure Oil Company's platform "A") for a distance of $9\frac{1}{2}$ miles to a point terminating on the offshore drilling platform "A" of the Phillips Petroleum Company and Kerr-McGee Oil Industries, Inc., located in the Rollover Field in the Gulf of Mexico which pipe line is designated grantor's Rollover Line No. 2;

(3) The 6-inch OD high pressure natural gas gathering pipe line one and one-half miles in length located in Blocks 38 and 39 in the Rollover Field in the Gulf of Mexico off the coast of Vermilion Parish, State of Louisiana, which connects The Pure Oil Company's offshore platform "B" with The Pure Oil Company's offshore platform "A" which pipe line is designated grantor's Rollover Line No. 3;

(4) The 10-inch OD high pressure natural gas gathering pipe line approximately one mile in length located under the coastal water of the Gulf of Mexico in Block 39 off the coast of Vermilion Parish, State of Louisiana, extending from said The Pure Oil Company's offshore platform "A" to the Phillips Petroleum Company-Kerr-McGee Oil Industries, Inc., offshore platform "A", which pipe line is designated grantor's Rollover Line No. 4; (all such gathering facilities being shown on a map attached to grantor's said Indenture of Mortgage dated June 7, 1955 hereinbefore referred to, and marked "Exhibit A", reference to which is hereby made).

(5) All the tracts or parcels of land, together with the buildings and structures [1740] thereon and appurtenances thereto, owned by grantor in Cameron Parish, State of Louisiana, including but not limited to, the following described tract or parcel of land situated in said Cameron Parish, together with all buildings, machinery, gas pipe lines, compressors, equipment and appliances situated on said land, and also including all equipment, appliances, and appurtenances of every kind or nature whatsoever used or for use as part of such properties, to-wit:

A tract of land beginning at the Intersection of the north line of the State Highway No. 292 with the West line of the public road running in a northeasterly direction from said State Highway No. 292 to North Island, which said point is in the south half of the northeast quarter of Section 25 in Township 15 south, Range 4 west, Louisiana meridian; THENCE from said point of beginning, running in a northeasterly direction along the said west line of the said North Island Road a distance of 350 feet; THENCE in a northwesterly direction on a parellel line with the north line of said State Highway No. 292, a distance of 620 feet; THENCE, in a southwesterly direction on a parallel line with the said West line of the said North Island road a distance of 350 feet, to the said north line of said State Highway No. 292, THENCE in a southeasterly direction, following the said North line of said State Highway No. 292 a distance of 620 feet to the point of beginning.

The separator and dehydrator plant and associated equipment and facilities located on the real property immediately described above in Cameron Parish, Loui-

siana, together with any and all pipe, pressure gauges, Christmas trees, connections, fittings, valves, and all equipment and personal property of every kind and character whatever upon, connected with, or appurtenant to said real property, and the separators and dehydrators and associated equipment and facilities above described, now situated thereon, whether or not attached to the realty, together with all improvements now on said property.

The operator's residence and garage located on the said real property in Cameron Parish, Louisiana, together with the water well and pump adjacent thereto.

(6) All of that tract of parcel of land lying and being in the SE/4 of SE/4 Section 3 Township 13 South, Range 3 West, Cameron Parish, Louisiana, being more particularly described by metes and bounds as follows:

[1741]

Beginning at a point on the South line of a Parish Road, said point being located South 88 degrees 04 minutes West a distance of 16.5 feet from the intersection of the said South Line of the Parish Road and the East line of Section 3 in Township 13 South, Range 3 West; Thence from said point of beginning running South 0° 20′ West, a distance of 424.2 feet to a point for corner; Thence running South 88° 04′ West a distance of 513.5 feet to a point for corner; Thence running North 0° 20′ East a distance of 424.2 feet to a point for corner in the South line of the said Parish Road; Thence along the South line of the said Parish Road North 88° 04′ East a distance of 513.5 feet to the point of beginning, containing 5 acres, more or less.

Also, all existing pipe lines erected and maintained on said property and all equipment and personal property of every kind and character placed thereon, and replacements to existing equipment, and improvements and all betterments thereto;

(7) Any and all pipe, pressure gauges, Christmas trees, connections, fittings, valves and all equipment and personal property of every kind and character whatsoever upon, connected with or appurtenant to, said property and gathering facilities above described in paragraphs (1) through (6) hereof.

Together with all rights, privileges, and appurtenances in anywise belonging, to the above-described property, or any part thereof.

TO HAVE AND TO HOLD unto said Commonwealth Oil Company, the above described pipe lines, gathering facilities, easements, lands, contracts, interests and estates and the personal property hereinabove described; subject, however, to the following:

[1742]

(i) The lien of the Indenture of Mortgage dated December 11, 1950 from grantor, as Mortgagor, to Texas National Bank of Houston (then South Texas National Bank of Houston), as Mortgagee, recorded in Book 161, Folio 189, under File No. 117865, Mortgage Records of Vermilion Parish, Louisiana, and in Book "V", Folio 155, under File No. 59924, Mortgage Records of Cameron Parish, Louisiana, as supplemented by Supplemental Indenture of Mortgage thereto dated February 10, 1951, between said Moragagor and Mortgagee, recorded in Mortgage Book "V", Folio 270, Conveyance Book 81, page 207, and in

Chattel Mortgage Book 5, all under File No 60251, of the Records of Cameron Parish, Louisiana:

(ii) The Lien of the Indenture of Mortgage dated July 8, 1953, between said Mortgagor and Mortgagee, recorded in Mortgage Book 172, under File No. 131207, and in Chattel Mortgage Book 21 under the same file number, of the records of Vermilion Parish, Louisiana; and

(iii) The Lien of the Indenture of Mortgage dated October 15, 1953, between said Mortgagor and Mortgagee, recorded in Mortgage Book 176, under File No. 132132, and in Chattel Mortgage Book 21 under the same file number, of the Records of Vermilion Parish, Louisiana.

And Commonwealth Oil Company declared and acknowledged that it had and does hereby assume and agree to pay the indebtedness referred to in the above described Indentures of Mortgage.

And The Marine Gathering Company acknowledged that it does hereby bind itself, its successors and assigns, to WARRANT AND FOREVER DEFEND, subject to and except for the indebtedness and liens hereinabove specifically excepted, all and singular the above described properties and premises unto Commonwealth Oil Company, its [1743] successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

THUS DONE, READ AND PASSED at my office, in the City of Houston, Harris County, State of Texas, in the presence of Baine P. Kerr and Jacqueline Ehlers, competent witn witnesses, who have hereunto signed their names with the parties and me, said notary, on the day,

month and year first above written but effective as of and from the 1st day of September, 1955, as aforesaid.

ATTEST:	THE MARINE GATHERING COMPANY
/s/ Clara A. Kessler Asst. Secretary	By: /s/ John H. Blaffer Chairman of the Board
[SEAL]	COMMONWEALTH OIL COMPANY
ATTEST:	
/s/ R. C. Ledford Asst. Secretary	By: /s/ G. Burton Liese President
[SEAL]	

WITNESSES:

/s/ Baine P. Kerr

/s/ Jacqueline Ehlers

/s/ Nita Ferguson
Notary Public in and for
Harris County, Texas

[SEAL]

My commission expires June 1, 1967

THE STATE OF LOUISIANA }
PARISH OF CAMERON }

OFFICE OF CLERK, 11th Judicial District Court

I HEREBY CERTIFY, That the above and foregoing is a true and correct copy of original filed for record the 6 day of October, 1955 Bearing title No. 722262 and recorded Book 609 of Conv. Page et seq.

(1743)

In testimony whereof, witness my official signature and seal at Cameron, Cameron Parish, Louisiana, on this 6 day of October A.D., 1955.

(Signed) J. BENTON DOUGLAS
Clerk of Court

[1744]

GENERAL CONVEYANCE AND AGREEMENT

This GENERAL CONVEYANCE AND AGREEMENT by and between The Marine Gathering Company, a Delaware corporation (hereinafter referred to as "Marine"), and Commonwealth Oil Company, a Florida corporation (hereinafter referred to as "Commonwealth"),

WITNESSETH:

WHEREAS, Commonwealth is the owner of all the outstanding shares of capital stock of Marine; and

WHEREAS, by Bill of Sale and Agreement dated September 1, 1955, Marine assigned and transferred to Commonwealth, its successors and assigns, all the property and assets of Marine other than the property specifically excepted therein, such transfer being made pursuant to a declaration of a dividend payable in such property by the Board of Directors of Marine; and

WHEREAS, the Shareholders and Board of Directors of Marine, at meetings duly called and held on February 11, 1957, have resolved to transfer the remaining assets of Marine to Commonwealth and to dissolve Marine; and

WHEREAS, Commonwealth, acting by and through its Board of Directors, has agreed to such transfer of the remaining assets of Marine, to such dissolution of Marine, and to the making of the covenants contained herein;

NOW, THEREFORE, in consideration of the premises and of the sum of Ten Dollars ($10) lawful money of the United States of America and other valuable considerations the receipt and sufficiency of which is hereby acknowledged, and in consideration of the convenants of Commonwealth contained herein, Marine has granted, bargained, sold, conveyed, assigned, transferred, set over and delivered and by these presents does grant, bargain, sell, convey, assign, transfer, set over and deliver to Commonwealth, its successors and assigns, all of the property and [1745] assets of Marine of every kind and character, real, personal or mixed, wheresoever located.

TO HAVE AND TO HOLD all such properties unto Commonwealth, its successors and assigns forever.

Marine covenants and agrees that it will execute and deliver to Commonwealth, its successors and assigns, upon reasonable request to do so, further and specific conveyances or instruments of transfer of any and all of the properties and assets covered by this instrument, all such instruments to bear the effective date of this General Conveyance and Agreement.

Commonwealth, by its execution hereof, agrees to assume and discharge all debts and obligations of Marine of every kind and description, imposed by law and outstanding, due, owing and unsatisfied at the time of this conveyance.

This General Conveyance and Agreement shall be effective as of 7:00 A.M. on March 1, 1957.

IN WITNESS WHEREOF, the parties hereto have duly

caused this instrument to be executed and delivered as of the date above specified.

THE MARINE GATHERING COMPANY
By: G. Burton Liese
President

ATTEST:
Howard M. Temple
Secretary

COMMONWEALTH OIL COMPANY
By: R. C. Ledford
Vice-President

ATTEST:
Howard M. Temple
Secretary

[1746]

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared G. Burton Liese, President of The Marine Gathering Company, a corporation, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity above stated and as the act and deed of said corporation

GIVEN under my hand and seal of office this 25th day of March, 1957.

CLARA A. KESSLER
Notary Public in and for
Harris County, Texas
My Commission Expires June 1, 1957

THE STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared R. C. Ledford, Vice-President of Commonwealth Oil Company, a corporation, known to me to be

the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity above stated and as the act and deed of said corporation.

GIVEN under my hand and seal of office this 25th day of March, 1957.

CLARA A. KESSLER
Notary Public in and for
Harris County, Texas
My Commission Expires June 1, 1957

[1747]

Invoice

COMMONWEALTH OIL COMPANY
510 Texas National Bank Building

Houston 2, Texas

The Pure Oil Company
P. O. Box 239
Houston, Texas

Date: Estimated First
Month's Billing
(31 days)

Item	Amount
For gas and condensate treated and transported from your Rollover Field to Tennessee Gas Transmission Company for month of (First Month Delivery)	
Total gas flowed and treated during month 1,990,559 @ 16.7 PSIA	
1,937,500 MCF (62,500/day)) @ $0.04	$77,500.00
53,059 MCF (excess) @ $0.03	1,591.77
	$79,091.77

CAPTION

[1748]

Filed Oct 31, 1957

BEFORE THE
FEDERAL POWER COMMISSION

Docket No. G-12583

THE PURE OIL COMPANY, *et al*	The Marine Gathering Company's FPC Gas Rate Schedule No. 1, Supplemented 1 through 6, and Agreement Relating to Contracts dated January 2, 1957

NOTICE OF SUCCESSION TO THE MARINE GATHERING COMPANY'S FPC GAS RATE SCHEDULE NO. 1 AS SUPPLEMENTED 1 THROUGH 6

The Pure Oil Company (Pure) files in triplicate this Notice of Succession to Marine's FPC Gas Rate Schedule No. 1 in compliance with the Commission's letter dated October 24, 1957 in Docket No. G-12583, The Pure Oil Company, et al.

Pure, Commonwealth Oil Company (formerly The Marine Gathering Company) and Tennessee Gas Transmission Company on May 16, 1947, filed with the Commission a joint application for a Certificate under 7(c) and to Abandon Service under 7(b) of the Natural Gas Act, which was assigned Docket No. G-12583.

A copy of agreement dated January 2, 1957, entitled "Agreement Relating to Contracts" was included as Exhibit "B" in the Application; the Agreement Relating to Contracts provides for the assignment by Marine to Pure of

the Marine-Tennessee Agreement dated March 16, 1950, for the sale of gas to Tennessee by Pure.

[1749]

Pure simultaneously herewith files in triplicate its new Rate Schedule G-8 which is composed of the following:

1. Sample billing to show how sales are made under the new agreements.

2. Agreement Relating to Contracts dated January 2, 1957.

3. The Marine Gathering Company's FPC Gas Rate Schedule 1 as Supplemented 1 through 6.

The Commission, in their letter of October 24, 1957, Docket No. G-12583, The Pure Oil Company, et al., referred to the fact that the Marine-Tennessee contract of March 16, 1950 had been amended on June 13, 1955, but that no copy of such amendment had been filed with the Commission. Pure was requested to file this amendment. The June 13, 1955 amendment has been made a part of Pure's new Rate Schedule No. G-8 by including it as Supplement No. 6 to Marine's FPC Gas Rate Schedule No. 1 which is a part thereof.

In the last paragraph of the Commission's letter of October 24, 1957 (Docket No. G-12583) a request is made for an explanation of why Exhibit "A" of the Agreement Relating to Contracts only contains 9 leases whereas the original dedication to Marine and thence to Tennessee had a total of 25 leases. In answer to the Commission inquiry Pure would show that originally on March 15, 1950 in the [1750] Pure-Marine agreement it dedicated 25 leases which Marine in the March 16, 1950 Marine-Tennessee agreement dedicated to Tennessee. When on January 2, 1957 the Agreement

Relating to Contracts was signed by Pure, Marine and Tennessee there were only 9 of the original leases which had not expired or been surrendered and been turned back by Pure to the lessor. No existing leases have been omitted.

Respectfully submitted,

THE PURE OIL COMPANY
By /s/ R. B. KELLY
R. B. Kelly,
Vice President

STATE OF ILLINOIS } SS
COUNTY OF COOK }

R. B. Kelly, being first duly sworn, deposes and says that he is a Vice President of The Pure Oil Company; that as such he has executed the foregoing Notice of Succession on behalf of it; that he is authorized to do so and that the matters of fact set forth therein are true and correct to the best of his knowledge, information and belief.

/s/ R. B. KELLY
R. B. Kelly

Subscribed and sworn to before me this 30th day of October, 1957.

/s/ LEVI B. NORINSKY
Notary Public

My commission expires:
November 21, 1959

[1751]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing documents upon all parties of record in this procedure, by

mailing a copy thereof properly addressed to the persons shown below:

Mr. Harold Burrow
Senior Vice President
Tennessee Gas Transmission Company
P. O. Box 2511
Houston 2, Texas

Mr. G. Burton Liese
President
Commonwealth Oil Company
Texas National Bank Building
Houston 1, Texas

At Chicago, Illinois, this 30th day of October, 1957.

/s/ J. R. McChesney
J. R. McChesney
Manager, Gas Department

THE PURE OIL COMPANY

[1752]

RATE SCHEDULE G-8
THE PURE OIL COMPANY

Filed
Oct. 31, 1957
Office of the Secretary
Federal Power Commission

This rate schedule and statement of estimated sales and billing, filed in accordance with provisions of Order No. 174-B issued December 17, 1954, covers the sale of gas from Block 39 Field (Rollover), off-shore from Vermilion Parish, Louisiana to Tennessee Gas Transmission Company.

[1753]

AGREEMENT RELATING TO CONTRACTS

AGREEMENT dated the 2nd day of January, 1957, between THE MARINE GATHERING COMPANY, a Delaware corporation, herein called "Marine", THE PURE OIL COMPANY, an Ohio corporation, herein called "Pure", and TENNESSEE GAS TRANSMISSION COMPANY, a Delaware corporation, herein called "Tennessee".

WITNESSETH:

Marine and Pure have heretofore entered into a Gas Purchase Contract dated March 15, 1950, as amended by letter agreement dated March 22, 1950, and agreements dated February 13, 1953, and June 20, 1955, and a Casinghead Gas Contract dated March 15, 1950, as amended by agreement dated February 13, 1953, relating to the sale by Pure and the purchase by Marine of gas produced from the Gulf of Mexico Field as therein defined, and the gathering by Marine of condensate produced with such gas, said agreements, as amended, being herein called the "Pure-Marine Agreement".

Marine and Tennessee have heretofore entered into an agreement dated March 16, 1950, as amended by agreements dated February 6, 1953, April 28, 1953, and June 13, 1955 (said agreement as amended being herein called the "Marine-Tennessee Agreement") under which [1754] Marine agrees to sell and Tennessee agrees to purchase all of the gas acquired or controlled by Marine produced in the Gulf of Mexico Field as therein defined, and dedicating to the performance thereof, the Pure-Marine Agreement and all rights and gas covered thereby.

Marine and Pure have determined to cancel and terminate the Pure-Marine Agreement, and to enter into a Hydro-

carbon Gathering and Separating Agreement of even date herewith relating to the gathering and separation of gas and condensate from leases of Pure now owned or hereafter acquired in certain fields as therein defined situated in the Gulf of Mexico Field as therein defined. As a part of this transaction, Marine has also determined to transfer and assign to Pure the Marine-Tennessee Agreement and Pure has agreed to assume and perform all of the obligations of Marine under said Marine-Tennesee Agreement to the extent as hereinafter provided.

Upon the terms and conditions herein stated Tennessee has consented to the termination of the Pure-Marine Agreement and the assignment of the Marine-Tennessee Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual agreements herein contained, the parties agree as follows:

1. In consideration of the execution and delivery by Marine and Pure respectively of the Hydrocarbon Gathering and Separating Agreement and the assignment by **[1755]** Marine to Pure of, and the assumption by Pure of Marine's obligations under, the Marine-Tennessee Agreement in so far as they cover and relate to gas produced by, or attributable to the interests of, Pure in leases in the Gulf of Mexico Field dedicated by Pure in Section 3(b) of this Agreement to the performance of the Marine-Tennessee Agreement, Marine and Pure hereby agree that the Marine-Pure Agreement is and shall be hereby cancelled and terminated effective at the effective date of this agreement as provided in Section 9 hereof (which date is herein sometimes called "the effective date of this transfer") save and except only the obligations of the respective parties thereto for settlement and payment of amounts due each other thereunder

on account of gas and condensate delivered and purchased prior to said effective time and date of termination.

2. Marine hereby transfers and assigns to Pure the Marine-Tennessee Agreement and all rights, benefits and obligations of Marine thereunder, save and except only the right of Marine to receive payment for all gas sold and delivered or to be paid for thereunder prior to the effective date of this transfer, and the obligations of Marine (i) which were performable or accrued prior to the effective date of this transfer, (ii) for the payment and accounting for gas and other sums due on account of gas delivered prior to said effective date, and (iii) for the sale and delivery of gas owned or controlled by Marine after the effective date of this transfer which is produced [1756] from leases in the Gulf of Mexico Field as in said Agreement defined. Marine shall be solely responsible for the performance of the obligations of Marine referred to in the foregoing items (i), (ii) and (iii), and expressly reserves and shall retain the right to receive payment of the amounts due for gas delivered or to be paid for, for periods prior to the effective date of this transfer.

3. In consideration of the transfer and assignment to it of the Marine-Tennessee Agreement and the consent of Tennessee thereto, Pure expressly covenants and agrees as follows:

(a) Pure hereby expressly assumes and will perform, comply with and fulfill all of the obligations of Marine as the seller in the Marine-Tennessee Agreement with respect to the sale and delivery of gas produced from the leases dedicated hereto under the following Subsection (b), which are performable after the effective date of this transfer in like manner and to the same extent as though Pure had been, and had been named as, the original party seller to

said Agreement, except that Pure shall not be obligated to perform the obligations of Marine referred to in items (i), (ii) and (iii) of the foregoing Section 2.

It is agreed, however, the delivery of casinghead gas under the Marine-Tennessee Agreement and hereunder will be optional with Pure.

(b) Section 4 of the Marine-Tennessee Agreement is hereby amended by striking out and cancelling Subsections **[1757]** (a), (b) and (c) of said Section 4 in their entirety. In lieu thereof, the following provisions of this Subsection (b) are substituted, namely:

> "The leases of Pure which are and shall be subject to this agreement are those now held which are described in Exhibit "A" hereto annexed and made a part hereof, and those in which interests are hereafter and during the term of the Marine-Tennessee Agreement acquired by Pure which cover areas situated in any field (as the word 'field' is hereinafter in this Subsection (b) defined) containing leases dedicated hereunder within the Gulf of Mexico Field. Whenever Pure shall obtain additional lease interests in any such field, it shall advise Tennessee thereof in writing and the parties shall execute an amendment to Exhibit "A" describing said lease interests and the area in which the same are held. The execution of such amendment shall not, however, be a condition precedent to the effectiveness of the dedication herein made. Pure dedicates to the performance of this agreement all gas in and under and produced from the reserves attributable to Pure's interest in each and all of such leases. Such leases shall, however, be subject to Pure's right to a release of such of said leases and reserves which Tennessee may become obligated to release under this Sub-

section [1758] (b), or which are otherwise released under the terms of this section."

It is agreed, however, that if Leases Nos. 7, 8, or 9 described in Exhibit "A", are by Pure made subject to pooling, unitization or joint development agreements which also cover the leases of others on the same structure, as to all of the gas rights under the areas covered by such leases, or any portion thereof, and Pure's participation under such agreement is less than fifty per cent (50%) and the other parties thereto are unwilling for the gas to Pure subject to such pooling, unitization or joint development agreement to remain subject to this agreement, then the interests of Pure which are subject to such pooling, unitization or joint development agreement and the gas attributable thereto shall be released from this agreement and dedication hereto. Pure shall give written notice to Tennessee of the existence of such pooling, unitization or joint development agreement and the written statement of such other parties of the unwillingness of the other parties thereto to Pure's interests remaining subject to this agreement, and thereupon such interests shall be released from this agreement without any act by Tennessee being required.

Notwithstanding any provision of this agreement or of this Subsection (b) to the contrary, if under the terms or provisions of any agreement or leases under which any leases or lease interests were acquired by Pure after March 15, 1950, such leases or lease interests are prohibited from dedication hereunder, such leases and lease [1759] interests and the gas attributable thereto shall not be or become subject to this agreement. There are also excepted from dedication hereunder the interests of Pure under the leases in the Creole Field which are described and referred to under letter agreement between Pure and Marine dated March 22, 1950.

For the purposes of this Subsection (b) "field" shall mean a geological structure. Reserves of any field are to be the sum total of the reserves in all reservoirs associated with such geological structure. "Reserves" shall include all proven reserves.

(c) Whenever Pure at any time and from time to time discovers gas and completes a gas well capable of producing gas in commercial quantities on leases which have been acquired by Pure in the Gulf of Mexico Field subsequent to the date of this contract, and such leases are situated in a field from which gas is not at the time being sold by Pure to Tennessee under the Marine-Tennessee Agreement and hereunder or which are not situated in a field containing leases dedicated by Pure hereunder to said Marine-Tennessee Agreement, Pure will notify Tennessee in writing of such discovery and furnish Tennessee a description of the leases held by Pure in the field, as defined in the foregoing Subsection (b), where such discovery is made. If at the time of delivery of such notice of discovery or thereafter Pure determines to market gas from such afteracquired leases, Pure will notify Tennessee in writing that Pure desires to market gas from such leases. [1760] Tennessee shall have a preferential option for a period of ninety (90) days after receipt of such written notice that Pure desires to market such gas to elect in writing to purchase or not to purchase gas from such afteracquired leases in such field under the terms and provisions of the Marine-Tennessee Agreement, as hereby amended, except that the delivery point shall be at a central point in such field to be mutually agreed upon, the minimum quantity to be purchased from such leases shall be a daily quantity equal to one thousand (1000) MCF of gas per day for each ten million (10,000,000) MCF of gas originally in place in the recoverable proven reserves of Pure in and under the

lands covered by such leases, and the price to be paid therefor shall be the price per MCF equivalent to the highest of the following three prices:

(1) The highest bona fide price offered to Pure for gas to be purchased from any such lease or leases, adjusted for differences, if any, in the terms of said highest bona fide price offered and the terms contained herein with respect to the quality, measurement and delivery of gas;

(2) The prevailing market price then being paid to producers for gas under contracts which are in force at the time Pure notified Tennessee of Pure's desire to market such gas which provide for delivery of daily quantities of gas approximately equal or greater than the contract quantity hereunder over a similar period of time and upon substantially the same terms adjusted for differences, if any, **[1761]** in the terms of this contract and the contracts establishing the prevailing market price of measurement, quality and delivery as set forth herein, from the Gulf of Mexico Field: or

(3) The price being paid at the time for gas sold by Pure to Tennessee under the Marine-Tennessee Agreement, as hereby amended.

4. (a) Tennessee and Pure agree that the Marine-Tennessee Agreement and particularly Subsection (a) of Section 3, item (iii) of Subsection (a) of Section 5, Subsections (b) and (e) of Section 5, Subsection (c) of Section 7, Section 10 and the first two (2) paragraphs of Section 11 thereof shall be and hereby is amended so that said respective items, Subsection and paragraphs shall hereafter read as follows:

Subsection (a) of Section 3.

"(a) Seller reserves the following rights:

(i) To operate Seller's property free from any control by Buyer in such manner as Seller, in Seller's sole discretion, may deem advisable, including without limitation, the right to drill new wells, to repair and rework old wells, and to abandon any well or surrender any lease or portion thereof which is not productive, or when no longer deemed by Seller to be capable of producing gas in paying quantities under normal methods of operation; provided, however, in the event Seller should terminate [1762] or surrender any lease described in Exhibit "A" hereto attached, written notice of same shall be given to Buyer within thirty (30) days, and such lease as to the land affected by such surrender shall be released from dedication hereunder.

(ii) To process the gas, or have same processed, before delivery to the Buyer, for the recovery of liquefiable hydrocarbons, providing, such processing will not render the gas incapable of meeting the quality specification contained in Section 6 hereof.

(iii) To use gas produced from the leases for developing and operating Seller's leases covered hereby and such Seller's other leases in the immediate vicinity, for the operation of such Seller's pipe lines, water stations, camps and other miscellaneous uses incident to the operation of such property, and to fulfill obligations to a Lessor of any lease subject hereto for domestic fuel:

(iv) To unitize any of Seller's property with other properties of Seller and of others in the same field, in which event this contract will cover Seller's interest in the unit and gas attributable thereto:

(v) To use gas produced from property for repressuring, pressure maintenance or cycling operations on said property and Seller's other [1763] property in the immediate vicinity thereof before delivery into Buyer's pipe line system; provided, however, Seller will not utilize gas for pressure maintenance or cycling if by so doing Seller would be unable to perform its delivery obligations hereunder."

Item (iii), Subsection (a) of Section 5.

"(iii) From January 1, 1953, a quantity per day which is equal to one thousand (1000) MCF for each ten million (10,000,000) MCF of recoverable gas originally in place within the dedicated reserves, if deliverable at the maximum efficient rates of flow of the respective wells as determined by Seller and under applicable allowables, but in no event more than fifty-five thousand five hundred seventy-four (55,574) MCF per day; or"

Subsection (b) of Section 5.

"(b) Buyer shall have the right to purchase, and Seller will sell and deliver to Buyer such quantity of gas per day in addition to the contract quantity as Buyer may from day to day elect to purchase up to the total quantity per day which the wells on the leases dedicated hereto are capable of producing when produced at their respective maximum efficient rates of flow as determined by Seller, or at their respective allowable rates of flow under applicable orders, [1764] rules, regulations or laws, whichever is the smaller quantity."

Subsection (e) of Section 5.

"(e) If, after the date of initial delivery of gas

hereunder, Seller fails, because the contract quantity cannot be produced and delivered under maximum efficient rates of flow as determined by Seller or under allowable rates of flow or because of any other reason except force majeure, to make available to Buyer hereunder for any period of one hundred eighty (180) consecutive days the total contract quantity (within the variation permitted by the foregoing Subsection (c) of this Section 5) for such period, Buyer may, in addition to any other rights which Buyer may have, reduce the contract quantity to the average daily quantity which Seller did make available during such one hundred and eighty (180) day period. In the event of any such reduction the quantity by which the contract quantity at the time is so reduced shall never be taken in account or included in determining whether there is an additional quantity of gas, or the amount of the additional quantity of gas, available for delivery as provided under the foregoing Subsection (a) of this Section 5, and in no event shall Buyer be required to make any election or Seller be entitled to any release **[1765]** under said Subsection (a) as to any quantity which includes the quantity by which the contract quantity shall have been reduced under this Subsection (e) or any reserves attributable thereto."

Subsection (c) of Section 7.

"(c) The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) Fahrenheit and at a pressure of three hundred and twenty-five thousandths (0.325) of a pound per square inch above an assumed atmospheric pressure of fourteen and seven-tenths (14.7) pounds per square inch (fifteen and twenty-five

thousandths (15.025) pounds per square inch absolute)."

Section 10.

"10. Delivery Point. The point of delivery for gas deliverable hereunder shall, except as otherwise expressly provided, be at the point at which Marine was delivering gas to Tennessee under this Agreement immediately prior to the effective date of the agreement in which this amended Section 10 is set forth."

The first two (2) paragraphs of Section 11.

"11. Prices. The prices to be paid by Buyer for gas delivered or to be paid for hereunder shall be as follows:

From the date of initial delivery until November 1, 1954	9.25 cents per MCF

[1766]

From November 1, 1954 to the effective date of this amendment to Section 11	10.25 cents per MCF
From the effective date of this amendment of Section 11 to November 1, 1958	9.22193 cents per MCF

During each of the additional respective periods from November 1, 1958, to November 1, 1962, November 1, 1962, to November 1, 1966, and November 1, 1966 to the expiration of the term hereof, the price per MCF to be paid shall be determined by agreement between Buyer and Seller to be made for each such period not less than six (6) months prior to the expiration of the preceding period, and, if the parties are unable to agree, the price shall be determined by arbitration.

The price for each such period shall be the average of the three (3) highest prices, as determined by agreement or arbitration, payable at the commencement of such period by transporters of natural gas for public consumption (including Buyer) for gas produced within the pricing area under contracts with producers, under which deliveries of gas are being made at the time of agreement or arbitration, and which provide for daily delivery of quantities of gas over a similar period of time and upon substantially the same terms of measurement, quality and delivery as set [1767] forth herein, but in no event shall such prices be less than 10.12162 cents per MCF during the fourth period, 11.02132 cents per MCF during the fifth period, and 11.92102 cents per MCF during the sixth period."

(b) Tennessee and Pure also agree that if for any reason Marine fails or refuses to perform the services for Pure with respect to the gas deliverable under the Marine-Tennessee Agreement which Marine has agreed to perform under the Hydrocarbon Gathering And Separating Agreement then the obligation of Pure to sell and deliver gas shall be suspended as in the case of "force majeure" under the provisions of Section 14 of the Marine-Tennessee Agreement, provided, however, that Pure shall with all reasonable dispatch and without undue delay either (i) require and cause Marine to carry out and perform Marine's obligations under said Hydrocarbon Gathering And Separating Agreement or (ii) install, maintain and operate such gathering lines and other pipe lines and facilities as may be necessary to enable Pure to perform Pure's obligations under the Marine-Tennessee Agreement.

(c) Notwithstanding any of the terms and provisions of the Marine-Tennessee Agreement and of this agreement to

the contrary, it is expressly agreed that if under the terms of the aforementioned Hydrocarbon Gathering and Separating Agreement Marine is not obligated to build such gathering lines and other facilities as may be necessary to gather and deliver to Tennessee for the account of Pure [1768] the gas produced from any new field which contains leases dedicated to this agreement hereafter discovered by Pure within the Gulf of Mexico Field, then Pure shall not be obligated to install and operate gas gathering lines and facilities in order to make delivery of such gas to Tennessee under the Marine-Tennessee agreement as amended hereby. Tennessee shall, however, have the right exercisable by written notice delivered to Pure within one hundred eighty (180) days after written notice from Pure that Marine is not obligated to and will not gather gas from such field, to install and operate such gathering lines and facilities. Should Tennessee elect to install and operate such lines and facilities, then it will proceed diligently with the installation thereof. The delivery point for gas from such field, shall be at the terminus of Tennessee's gathering line at a central point therein to be mutually agreed upon. Otherwise all provisions of the Marine-Tennessee Agreement as amended hereby shall be applicable.

5. Tennessee hereby consents to the termination of the Pure-Marine Agreement and to the transfer and assignment by Marine to Pure of the Marine-Tennessee Agreement, and all rights of Marine thereunder except the right of Marine to receive payment for all gas delivered or to be paid for prior to the effective date of this transfer, and Tennessee agrees that except with respect to the obligations retained and undertaken by Marine which are referred to in the foregoing items (i), (ii) and (iii) of Section 2.

[1980]

FPC GAS RATE (Checked)
SCHEDULE NO. 40
SUPPLEMENT NO. 9
CERT. DOCKET
IP. NO. S-1035
FILING DATE: 12-26-62
EFFECTIVE DATE: 11-1-62

SUPPLEMENT NO. ...... TO THE PURE OIL COMPANY'S FPC GAS RATE SCHEDULE NO 40

NOTICE OF INDEPENDENT PRODUCER RATE CHANGE

1. Producer: The Pure Oil Company
(Name)
200 East Golf Road, Palatine, Illinois
(Address)
2. Buyer: Tennessee Gas Transmission Company
3. Location of Sale: Rollover Bl. 39, Offshore Vermilion,
(Field) (County)
Louisiana
(State)
4. (a) FPC Gas Rate Schedule No. 40
(b) Basic Contract Date March 16, 1950
5. (a) Type of Change: Notice in Compliance with Commission Order approving Rate Settlement proposals as amended, issued November 27, 1962.
(b) Contract Basis: Contract amendment of December 18, 1962.
(Specify Contract Provision)
attached hereto and made a part hereof.
(c) November 1, 1962
(Effective Date)

6. Rates in Cents Per Mcf at 15.025 psia:
(Specify)

	Base Rate	Tax Reimbursement	Other* (Specify Separately)	Total Rate
(a) Present Effective Rate	21.33333¢	—		21.33333¢
(b) Proposed Rate:	16.75¢	—	[1]	[1]

[1] Payments made by Pure to Jupiter under "Hydrocarbon Gathering and Separating Agreement" dated January 2, 1957. Charge is presently 4¢ per Mcf (16.7 psia, on first 62.5 MMCFD and 3¢ per Mcf (16.7 psia) on additional volumes. Total rate will depend upon amount actually paid by Pure to Jupiter.

[1983]

December 18, 1962

Tennessee Gas Transmission Company
P. O. Box 2511
Houston, Texas

Attention: Mr. Walter Fawcett

Gentlemen:

Reference is hereby made to that certain Gas Purchase and Sales Agreement dated March 16, 1950, as amended, between Tennessee Gas Transmission Company, Buyer, and The Pure Oil Company, successor in interest to The Marine Gathering Company, Seller, relating to the purchase and sale of gas from the Rollover Block 39 Field, Vermilion Area of the Gulf of Mexico, said Agreement hereinafter referred to as the "Contract".

Whereas, Buyer and Seller desire to amend Section 5 and Section 11 of the Contract in respects hereinafter mentioned:

Now therefore, in consideration of the premises and

agreements herein contained, Buyer and Seller do hereby agree as follows:

(1) Subsection (f) of Section 5 shall hereafter read as follows:

> "(f) If for any month Buyer pays for gas not received, Buyer may make up the deficiency by crediting such excess payment against quantities taken in excess of the total quantity for any month within five (5) years after such deficiency in takes accrues."

(2) The first paragraph of Section 11 (Schedule of Prices) is hereby deleted in its entirety and there is hereby substituted in lieu and in place thereof the following:

> "The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder shall be the sum of (a) and (b) below:

(a) From the date of Federal Power Commission authorization to November 1, 1966	16.75 cents per MCF
From November 1, 1966 to November 1, 1970	17.75 cents per MCF
From November 1, 1970 to date of expiration of this Contract	18.75 cents per MCF

(b) The average payment in cents per MCF paid to The Jupiter Corporation by The Pure Oil Company for gas transportation, which shall be determined monthly by dividing the total payment made by The Pure Oil Company to The Jupiter Corporation by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4¢) per MCF for the first sixty-two

thousand, five hundred (62,500) MCF per day and three cents (3¢) per MCF on additional volumes."

(3) The second paragraph of Section 11 (Price Redetermination Clause) in its entirety and the fourth and fifth paragraphs of Section 11 (Favored Nations Clause) in their entirety are hereby deleted.

This agreement shall not operate to alter or change the Contract except as hereby amended and such Contract shall continue to be in full force and effect.

If the foregoing is satisfactory and acceptable, please execute in duplicate counterparts and have one fully executed copy returned to us for our files.

Yours very truly,

THE PURE OIL COMPANY

By ....

C. W. Hancock, Division Manager
Southern Producing Division

CWH-bp

AGREED TO AND ACCEPTED this 19th day of December, 1962.

TENNESSEE GAS TRANSMISSION COMPANY

By WALTER FAWCETT
Vice President

[2535]

CAPTION

Filed 9/19/62

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the matters of THE PURE OIL COMPANY	Docket Nos. G-16790, G-17329, G-17541, G-17729, G-17731, G-17764, G-20283, G-13961, G-14050, RI60-100, RI60-345, RI61-331, RI62-72, RI62-204, RI62-210, RI62-456 and RI62-482

PETITION

for

APPROVAL OF SETTLEMENT PROPOSAL

John C. Snodgrass,
Attorney
200 East Golf Road
Palatine, Illinois

[2536]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the matters of THE PURE OIL COMPANY	Docket Nos. G-16790, G-17329, G-17541, G-17729, G-17731, G-17764, G-20283, G-13961, G-14050, RI60-100, RI60-345, RI61-331, RI62-72, RI62-204, RI62-210, RI62-456 and RI62-482

PETITION FOR APPROVAL OF SETTLEMENT PROPOSAL

Like many independent producers of natural gas subject to the jurisdiction of the Federal Power Commission, The Pure Oil Company has been and continues to collect prices for its natural gas, the lawfulness of which are the subject of controversy. Very considerable sums have been and are being collected with contingent refund obligations. Unlike most of the medium to large producers, however, Pure's gas prices have never been made the subject of a general rate proceeding. However, the Staff has recently completed a field investigation of Pure's books and records at the Company's home office.

Faced with the probability of delay in the final determination of the prices which it should be collecting pending the conclusion of area rate proceedings, Pure's management directed their efforts toward possible settlement of these controversies be initiated. It was and continues to be Pure's belief that such a settlement will promote greatly needed stability, permit sounder planning and financing for both Pure and the companies transporting and distributing the gas Pure produces and would thus be of significant benefit to the public interest.

[2537]

Therefore, shortly after the first of the year Pure began preliminary informal discussions with various parties who had participated in proceedings before the Federal Power Commission. When it appeared that settlement negotiations might have some chance of success, Pure formally requested the convening of a settlement conference. Inasmuch as it was felt that the Permian Basin Area Rate Proceeding, Docket AR61-1 had progressed to a point where it would be inadvisable to attempt settlement of

rates involved in those proceedings, responsible members of the Staff determined that it would be appropriate to notify all parties to the Southern Louisiana Rate Proceeding, Docket AR61-2 of the proposed conference. This was done on April 17, 1962, and representatives of several Eastern Seaboard Distributing Companies,[1] together with members of the Staff, began formal settlement negotiations with Pure. The negotiations continued from time to time until agreement was finally reached. This proposal embodies the settlement terms which, as Pure understands them, were agreed upon. Pure solicits any comments which the distribution companies care to make.

BACKGROUND OF THE NEGOTIATIONS

The Pure Oil Company is a fully integrated oil company, engaged in the production of oil and gas, transportation of crude oil and products, refining and marketing. The Company sells natural gas to various purchasers pursuant to contracts on file with the Federal Power Commission. Pure presently has 59 active rate schedules on file with the Commission.

[2538]

Of particular significance and importance in the negotiations leading up to this proposal are the circumstances surrounding Pure's sale of gas to Tennessee Gas Transmission Company from the Rollover Field, Offshore Louisiana. The importance of the rate negotiated for this sale lies in the large volumes involved and the unique circumstances surrounding the discovery, development and sale of the Rollover gas. Pure was among the first to explore for oil and gas on the Continental Shelf, Offshore Louisiana.

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[1] Public Service Electric & Gas, UGI, Consolidated Edison, Long Island Lighting, Philadelphia Electric.

In 1949 after two wells had been drilled and abandoned on the Rollover leases, Pure brought in the discovery well. While it was immediately apparent that a substantial discovery had been made, there appeared to be little justification to continue development so as to evaluate just how large the discovery was inasmuch as the well was 10 miles from shore in 40 feet of water. At that time it had yet to be demonstrated that it was economically feasible, or for that matter even possible, to lay and operate a gas pipe line on the floor of the Gulf of Mexico. Pure immediately began contacting prospective purchasers. Eventually every major transmission company with operations in Southern Louisiana was approached as well as two wholly paper companies, which as it developed never got into the business. Despite the most strenuous efforts Pure was unable to induce any of them to undertake the pioneering effort involved. In September, 1949, Marine Gathering Company, a new and at the time wholly paper organization, learned of Pure's efforts to locate a buyer for the Rollover gas, and suggested negotiation for a contract. Having exhausted all other sources of market, Pure elected to institute serious

[2539]

negotiations with Marine during the month of November, 1949. It is to be noted that the primary term of the original leases was running against Pure, and that in the over-all picture it appeared that the remaining two years were on the order of a minimum in which contractual negotiations could be concluded and the remaining work looking toward assuring deliverability of volumes necessary to load the pipe line could be accomplished.

It must be remembered that offshore drilling and producing operations were then still in their infancy. In addition to the enormous technical problems involved in drilling

in over forty feet of open sea, the new efficient weather system was then very crude and as a result Pure constantly suffered interruptions and delays in order to insure the safety of its workmen.

Negotiations continued until March 15, 1950, when Pure, still having been unable to locate any other purchaser, signed a contract with Marine by which Marine agreed to purchase gas in the field, transport it to shore, and thence to a major pipe line company for resale. The original sales price was 4.5¢ per mcf @ 15.025 psia as opposed to the then current average field price of approximately 9¢ per mcf.

This then was truly a "distress" or "forced" sale.[1] It was not until after the Pure-Marine contract was signed that Tennessee announced plans to extend its line from its Kinder, Louisiana Terminal **[2540]** to a point some 26 miles east of the Town of Creole, Cameron Parish, Louisiana. This extension gave Marine a market close to the point adjacent to Pure's offshore Rollover Field. Exploration and development continued and the estimate of original reserves (agreed to by the pipe line) increased from 278 billion cubic feet as of 4/9/51 to 389 billion cubic feet as of 3/6/52, to 737 billion cubic feet as of 5/25/55, and to 879 billion cubic feet as of 7/1/59.[1] (All figures at 15.025 psia.)

In 1957, Pure amended its contract with Marine so as to make the sale directly to Tennessee onshore and pay

[1] Pure has suffered a loss in revenues of $9,907,000 as compared to Tennessee's going rates from the date of initial delivery through December, 1961. This is the cost to Pure for the pioneering of sales from the Gulf of Mexico. Shortly after the Rollover sale demonstrated the feasibility of subterranean transportation, it became common practice for pipe line companies to lay lines into the Gulf and pay regular field prices.

[1] Furthermore, if Pure's proposal is accepted we plan to spend $1,250,000 *this year* for additional drilling in the Rollover area committed to Tennessee.

Marine a fee to transport the gas to shore. The fee, 4¢ (16.7 psia) for the first 62.5 million cubic feet per day and 3¢ (16.7 psia) on additional volumes averages 3.4¢ (15.025 psia) per mcf. In 1958, Pure and Tennessee renegotiated the price to 21.3¢ for gas delivered onshore. This then results in a central field point price of 17.9¢ per mcf.

The name of Marine Gathering Company was changed to Commonwealth Oil Corporation and quite recently Jupiter Oil Corporation succeeded to the interests of Commonwealth.

No doubt these circumstances, which were brought to the Commission's attention when the rate increase was filed, influenced the Commission to grant Pure a shortened suspension period of two months rather than the customary five. We repeat them here so that the present commission and interested parties will understand the unique circumstances which played such an important part in the negotiations leading up to this proposed settlement.

[2541]

EXPLANATION OF THE PROPOSED SETTLEMENT

This proposal covers all of Pure's present rate schedules with the exception of those in the Permian Basin and two small sales made just outside the Permian Basin. The gas from these two sales[1] is run through plants and thence into the Periman Basin and the price is tied to El Paso Natural Gas Company's Permian Basin purchasing rates. With two exceptions Pure proposes to reduce its rates to

[1] R.S. 32, Vena Madre Field, Nolan County, Texas, purchaser-West Lake Natural Gasoline Company.
R.S. 42, Nena Lucia Field, Nolan County, Texas, purchaser-West Lake Natural Gasoline Company.

the applicable area ceiling rates promulgated by the Commission in its Statement of General Policy 61-1, as amended, or to the last firm, non-refundable rate, whichever is higher. The two exceptions are: First, a sale to Transcontinental Gas Pipe Line Corp. from the Block—k 76 Field, Offshore Louisiana under Rate Schedule 39. The price proposed for this sale is 19¢ per mcf (15.025 psia) i.e. .5¢ lower than the present ceiling price. (Second, the sale to Tennessee Gas Transmission Company from the Rollover Field, Offshore Louisiana under Rate Schedule 40. The price proposed for this sale is 16.75¢ per mcf (15.025 psia) plus the charges actually paid by Pure to Jupiter Oil Corporation.)

As part of the proposed settlement on the Rollover sale the make up period for gas paid for but not taken is extended.

Pure also proposes a moratorium on future rate increase filings which would exceed the Commission's applicable ceiling prices **[2542]** until March 1, 1966. This moratorium will not prevent increases up to the ceilings nor the filing for tax reimbursement of increased or newly imposed taxes.

All rates will be subject to the final determinations in the Area Rate Proceedings and will be adjusted up or down as the case may be.

Finally, Pure proposes to refund to its pipe line customers the difference between the settlement price and the price actually collected from and after April 1, 1962 except as to the sale under rate schedule 39 in which case refund will be two thirds of such difference from the date of initial delivery until July 1, 1962 and full refunds thereafter. Proposal annexed hereto is in the public interest and should be accepted by the Commission. The reasons therefor are as follows:

The proposal settles all of Pure's Section 4(e) dockets, with the exception of those involving sales in the Permian Basin Area.

The Proposal provides for an extended period of price stability under Pure's existing rate schedules, since it prescribes a moratorium on future rate increase filings. Moreover, for the period of the moratorium, the number of rate increase filings to be made by Pure will be limited to those involving increased rates at or below the applicable area rate level, with the result that the Commission will be relieved of the necessity of processing numerous future suspension dockets.

The proposal, with three exceptions, *conforms to the area rate patterns* which have been announced by the Commission. One exception is the price proposed for Pure's Rate Schedule No. 39, involving **[2543]** a sale from the Block 76 Field, Offshore Louisiana. Under the proposal this sale will be made at 19¢ per mcf rather than the present ceiling price of 19.5¢ per mcf. This is the same level at which numerous other producers have negotiated settlements approved by the Commission. See Texaco Inc. et al. Docket G-13169, et al. Order dated 7/30/62.

The second exception is a sale to Hope Natural Gas Company from the Cabin Creek Field in West Virginia under Rate Schedule No. 7. The rate for this sale increased from 26.88¢ to 28.96¢ per mcf in 1959. This was the first price increase since 1937. Although the initial ceiling price for this area is 28¢ per mcf, 15.325 psia, the rate will be rolled back to the 1937 level of 26.88¢ per mcf, 15.025 psia.

The final exception is the sale to Tennessee Gas Transmission Company from the Rollover Feld, Offshore Louisiana under Rate Schedule No. 40, which was explained, supra, in detail.

As previously indicated, the Staff has made a field investigation of Pure's books and records. The data accumulated by the Staff and Pure's accountants in the course of that investigation was utilized in the preparation of Pure's response to the Commission's Questionnaires (Appendix A and B) in the Permian Basin Area Rate Proceeding, Docket AR61-1. Pure's said Appendices A and B were then checked and verified by the Staff, after which, Pure caused a cost-of-service study utilizing such material for the test year 1960 to be prepared by the accounting firm of Arthur Andersen & Company. The study, prepared generally according to the principles adopted by the Commission in Opinion 338, together with the working papers, were turned over to the Staff and representatives of the distribution companies.

[2544]

There were differences of opinion as to certain of the methodology employed in the study, which showed unit costs of 17.1¢ per mcf (14.65 psia), and the Staff set forth in its brief in Docket No. RI62-482, Pure Oil Company, its conception of the methods and principles Pure should have used in the study. Pure, although not agreeing with the Staff, adopted the Staff's methods and applied December 31, 1961 rates to adjust its revenues, but still obtained a revenue deficiency of 1.25¢ per mcf in 1961. The Staff did not make a check of Pure's revised study but conceded that Pure was probably not in an excess revenue position. Accordingly, parties to the settlement negotiation finally agreed that Pure should be required to refund to the settlement rates from April 1, 1962 for all but the sales under Pure's Rate Schedule No. 39 in which case refunds in accordance with the Commission's order of July 30, 1962 in *Texaco, Inc.*, Docket G-13169 et al. would be required. The April 1, 1962 date for the commencement of refunds was

chosen because it approximates the date at which negotiations began.

Pure's average jurisdictional revenues for the test year 1960 were only 12.4¢ per mcf (14.65 psia). Average revenues utilizing 1960 volumes and the prices in effect on December 31, 1961 are only 13.597¢ per mcf (14.65 psia). At the proposed settlement rates the indicated unit realization is slightly less than 13¢ per mcf (14.65 psia). This is very substantially below the industry average and much lower than settlement rates approved by the Commission in recent months. The reduction in Pure's jurisdictional gas revenues from present levels will amount to approximately $640,000 per year and it is estimated that **[2545]** during the term of the moratorium proposed there will be a reduction of charges to jurisdictional purchasers below those contractually authorized of approximately $2,809,000.

The Settlement Proposal is atached hereto.

WHEREFORE, it is respectfully requested:

1. That the Commission enter an order approving the Settlement Proposal in its entirety and terminating the proceedings affected thereby;

2. That the Commission waive compliance by Pure with the requirements of the Commission's Rules and Regulations to the extent necessary to place this Settlement Proposal in effect; and

3. That the Commission grant such other and further relief as may be proper.

Respectfully submitted,

THE PURE OIL COMPANY

By ....

John C. Snodgrass,
Its Attorney

[2546]

THE PURE OIL COMPANY
DOCKET NOS. G-16790, ET AL.

SETTLEMENT PROPOSAL

I

Proceedings Involved

The rate schedules and related proceedings involved in this Settlement Proposal are listed in Exhibit A annexed hereto and made a part hereof.

II

Settlement Terms

Subject to acceptance and approval by the Commission of this Settlement Proposal, The Pure Oil Company proposes the following:

1. *Prices*—To the extent required, the rate under each of the rate schedules listed in Exhibit A will be reduced so that the effective rate, inclusive of tax reimbursement, will equal the rate shown in column (5), identified as "Proposed Settlement Price."

2. *Moratorium*—Subject to the reservations set forth in Part III hereof and except as to the sale under rate schedule 39 Pure will not, prior to March 1, 1966, file for any increase in rate under any of the rate schedules listed in Exhibit A, provided, however, that such filings may be made prior to March 1, 1966, to the extent that the maximum statutory suspension period may be extended beyond five months. [2547] As to rate schedule 39 the moratorium will be effective until July 1, 1967.

3. *Refunds*—With the exception of rate schedule 39 Pure will refund to its pipe line purchasers the difference between the revenues actually received and those which would have been received at the proposed settlement rates

shown in Column (5) of Exhibit A from April 1, 1962 to the date upon which the rate reductions proposed are placed in effect, plus interest at 6% or 7% per annum, as applicable. As to rate schedule 39 Pure will refund 2/3 of the said difference from the date of initial delivery to July 1, 1962 and 100% of such difference thereafter plus interest at 6% per annum from initial delivery to March 1, 1960 and 7% to July 1, 1962 with refunds of gas paid for but not taken to be effected by a refund of gas in kind all as provided in the Commission's order of July 30, 1962 in *Texaco Inc.* Docket G-13169, as said order related to The Ohio Oil Company.

III

Reservations

In addition to and notwithstanding other provisions of this proposal, Pure reserves the right to file for price increases, to the extent permitted by its contracts as such contracts may be amended, under any of the rate schedules listed in Exhibit A hereto, under the following circumstances:

1. If the effective price under any rate schedule listed in Exhibit A hereto is at any time less than the applicable area price **[2548]** level announced in the Commission's Statement of General Policy No. 61-1, as now or hereafter amended, or established by any order or announcement of the Commission, Pure may file for any such higher price.

2. In the event that the Natural Gas Act is amended so as to remove or release from Commission jurisdiction any of the sales covered by the rate schedules listed in Exhibit A hereto, or any of the prices contained in any or all of such rate schedules, Pure may claim such price or prices as Pure may presently be or may hereafter become

entitled to under its contracts, and this Settlement Proposal shall in no way affect such rights of Pure.

3. With the exception of the sale under rate schedule 39, in the event of a levy of or an increase in State or Federal taxes, for which Pure may be entitled to reimbursement, in whole or in part, under its contracts, Pure may file at any time for any such tax reimbursement increase under any of the rate schedules listed in Exhibit A, to the extent permitted by the respective contracts. As to the sale under rate schedule 39 any filing for tax reimbursement will be limited to one half of any new tax imposed by the Federal Government and if said sale is hereafter held subject to the taxing authority of the State of Louisiana, Pure may file for a total price of 20.625¢ per Mcf.

[2549]

IV

Terms of Submission

Upon the Commission's acceptance of this Settlement Proposal and termination of the proceedings affected thereby, Pure agrees to proceed with due diligence and in good faith to file all required rate schedule supplements, to make the refunds proposed and to perform all other acts which are necessary to place in effect the provisions of this proposal.

Respectfully submitted,

THE PURE OIL COMPANY

By ....

John C. Snodgrass,

Its Attorney

[2550]

THE PURE OIL COMPANY

PROPOSED RATES

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
Texas Railroad Commission District No. 2					
United G.P.L. Co.	Blanconia	5	15.9	11.6	RI62-72 [2]
Texas Eastern Trans. Corp.	Vienna	70	15.2	11.0	RI62-201[3]
Texas Railroad Commission District No. 3					
United G.P.L. Co.	Fostoria	51	15.192	15.192	
Texas Railroad Commission District No. 4					
Coastal Trans. Corp.	Sharyland	47	16.0	16.0	
Texas Railroad Commission District No. 6					
Texas Gas Trans. Corp.	Carthage	2	10.6176	10.6176	
Natural G.P.L. Co. of America	Bryans Mill	73	15.0	15.0	[4]

[2551]

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
Texas Railroad Commission District No. 9					
Lone Star Gas Co.	Big Mineral Creek	71	14.0	14.0	
Texas Railroad Commission District No. 10					
Phillips Petroleum Co.	Hugoton	19	12.0	11.0	R160-345[5]
North Louisiana					
Southwest Gas Producing Co.	Hico-Knokles	24	14.98	14.98	
Arkansas Louisiana Gas Co.	Haynesville	55	11.796	11.796	
United G.P.L. Co.	Cotton Valley	56	13.05076	13.05076	
United G.P.L. Co.	Sligo	58	11.7752 @ 16.7 psia	11.7752 @ 16.7 psia	
Texas Gas Trans. Corp.	Hico-Knokles	64	18.25	18.25	
Texas Gas Trans. Corp.	Terryville Ruston	65	18.75	18.75	
Arkansas Louisiana Gas Co.	Calhoun	67	18.75	18.75	

[2552]

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
South Louisiana					
United G.P.L. Co.	Eugene Island	10	12.50286 @16.7 psia	12.50286 @16.7 psia	
Socony Mobil Oil Co., Inc.	West Gueydan	11	22.55	15.75	RI61-331[6] G-17764 G-14050
Transcontinental G.P.L. Corp.	Gueydan & S.E.	33	22.55	17.75	G-17541 [7] G-17729
Transcontinental G.P.L. Corp.	Block 76 (66)	39	21.4	19.0	RI62-482[8]
Tennessee Gas Trans. Co.	Rollover Block 39	40	17.9+Trans.	16.75+Trans.	G-16790 [9]
Tennessee Gas Trans. Co.	Lake Pelto	75	21.25	21.25	
Mississippi					
Olin Gas Trans. Co.	Carthage Point	13	10.0@ 15.225 psia	10.0@ 15.225 psia	
Oklahoma					
Panhandle Area					
Colorado Interstate Gas Co.	Keyes (Francis Unit)	36	16.0	15.0	G-13961
Michigan Wisconsin P.L. Co.	Laverne	48	17.0	17.0	[10]
Michigan Wisconsin P.L. Co.	S.E. Lovedale & Dotter	68	17.0	17.0	[11]
Colorado Interstate Gas Co.	Mocane	30	15.0	15.0	RI62-456[12]

[2553]

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
Other					
Lone Star Gas Co.	Alyesworth	42	16.8	11.0	RI60-456[12]
Lone Star Gas Co.	Velma Springer	45	16.8	11.0	RI60-100
Natural G.P.L. Co. of America	West Cement	46	15.0	15.0	[13]
Wunderlich Development Co.	Ponca City	53	6.2	6.2	
Lone Star Gas Co.	Caddo Dome	66	14.25	14.25	[14]
Lone Star Gas Co.	Doyle	72	10.00	10.0	
Cities Service Gas Co.	South Sterling	74	15.0	15.0	
Kansas					
Northern Natural Gas Co.	Harper Ranch (Nat.)	34	16.0	15.0	RI62-210
Northern Natural Gas Co.	Harper Ranch (Csg.)	35	15.0	14.0	RI62-210
Cities Service Co.	South Rhodes	44	13.0	12.0	G-20283
Panhandle Eastern P.L. Co.	Wil	63	15.0	15.0	
Colorado					
Kansas Nebraska N. G. Co., Inc.	Doll	49	10.9938	10.9938	

[1] Louisiana, Colorado, Utah, West Virginia and Wyoming prices at 15.025 psia with all other prices at 14.65 psia unless otherwise noted. All prices are base prices plus tax reimbursement (if any) unless noted.

[2] Proposed settlement rate of 14.6¢ is patterned after FPC General Policy Statement as amended. Price redetermination clause is to be removed and provision made for 1.0¢ periodic escalation every 5 years.

[3] Temporary authorization issued at Docket No. CI61-1791 with price at 15.0¢ conditioned to rate to be determined when permanent certificate issued. Initial rate at Docket No. CI61-1791 contains a floor price of 13.5¢. Initial delivery 7-25-61.

[4] Temporary authorization issued at Docket No. CI62-634 conditioning initial rate from 18.0¢ to 15.0¢. Initial delivery 3-20-62

[5] Application for abandonment being prepared as sale is in intrastate commerce.

[6] Proposed settlement price shown is before deductions for gathering on both low and high pressure gas and compression on low pressure gas.

[7] Base rate of 16.0¢ plus 1.75¢ tax reimbursement.

[8] A notice of increase (Supplement No. 1) was filed in this docket to 23.4¢ per Mcf and was suspended to Dec. 1, 1962. If this settlement proposal is accepted Supplement No. 1 will be superseded by the proposed 19¢ rate before the 23.4¢ rate ever becomes effective.

[9] Jupiter Oil Corporation charges Pure for transportation from the field (10 miles offshore) to Tennessee Gas Transmission Company main line on shore. The charges are 4.0¢ per Mcf (16.7 psia) for the first 62.5 MMCFD and 3.0¢ per Mcf (16.7 psia) for the remainder. These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure.

[10] Permanent certificate issued at Docket No. G-18881 for an initial rate of 17.0¢ plus BTU adjustment. Later amendments adding acreage to contract have received temporary certification conditioned to rate to be determined in certificate proceeding with a floor of 17.0¢. Rates as to this additional acreage will await outcome of said certificate proceedings.

[11] Temporary authorization issued conditioning initial rate to be that rate as determined in certificate proceeding. Collecting 17.0¢ plus BTU adjustment with a floor price of 17.0¢. Rate will await outcome of certificate proceeding.

[12] Present price and proposed settlement price is 15.0¢ plus BTU adjustment and is Pure's firm initial rate. There is a change

in rate at Docket No. RI 62-245 suspended until 11-4-62 for an increase to 17.0¢ plus BTU adjustment which will be superseded if the settlement proposal is accepted.

[2555]

[13] This rate also has a BTU adjustment for gas above and below 1,000 BTU.

[14] Base rate is 14.0¢ at 14.65 psia. Pure is collecting .25¢ for dehydration. This is an initial rate, permanently certificated.

[15] Application for abandonment filed 4-11-61 and assigned Docket No. CI61-1499. No money collected subject to refund.

• • • •

CAPTION

[2562]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

In the Matters of
THE PURE OIL COMPANY } Docket Nos. G-16790, *et al.*

RESPONSE OF LONG ISLAND LIGHTING COMPANY TO PETITION FOR APPROVAL OF SETTLEMENT PROPOSAL AND SETTLEMENT PROPOSAL

1. Pure implies that Long Island Lighting Company not only began settlement talks with Pure, but also agreed to the settlement terms embodied in the Settlement Proposal (Petition, pp. 2, 9). While representatives of Long Island Lighting Company did participate in such settlement talks in April, 1962, which ended in disagreement, Long Island Lighting Company had no notice of and did not participate in any negotiations with Pure in recent months, and has not at any time signified its agreement to the provisions embodied in the Settlement Proposal.

2. It is the position of Long Island Lighting Company that if in fact special circumstances justify an extraordi-

nary price, the appropriate price for the Rollover sale to Tennessee (RS 40) is no more than 14¢, exclusive of any tax which may be payable, plus the applicable transportation charge. It should be noted that even this total price exceeds the Commission's old gas ceiling.

[2563]

Under Pure's Settlement Proposal the total price would approximate 20.15¢.* This is unjustifiably excessive.

3. Pure proposes to make only token refunds in connection with its sale to Transco from the Gueydan Field (RS 33). The price for this sale was triggered by the Commission's erroneous certification of the Transco-Seaboard sales which were the subject of Opinion 315. There is no reasonable basis for permitting Pure to retain any of the proceeds of this sale in excess of the sum of the pre-triggering base price, and applicable tax reimbursement. Since consumers were erroneously required to pay these excess moneys, full refunds should be made. Anything less than full refunds will give to Pure a windfall at the expense of consumers.

4. In light of the pending motion filed June 22, 1962 by the New York Public Service Commission for reduction of South Louisiana ceilings, the price of 21.25¢ proposed for the sale to Tennessee under RS 75 is unacceptable.

* Pure pays a transportation charge to Jupiter Oil Corporation ranging from 4 to 3¢ per mcf, and averaging 3.4¢ per mcf (Petition, p. 5). It would appear that the justness and reasonableness of Jupiter's charge to Pure should be investigated.

• • • •

CAPTION

[2610]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

THE PURE OIL COMPANY, *et al.*	*Docket Nos.* G-16790, G-17329, G-17541, G-17729, G-17731, G-17764, G-20283, G-14050, RI60-100, RI60-345, RI61-331, RI62-72, RI62-204, RI62-210, RI62-456, RI62-482

ERRATA NOTICE

(December 5, 1962)

ORDER APPROVING RATE SETTLEMENT PROPOSAL, AS AMENDED, PRESCRIBING REFUNDS, SEVERING AND TERMINATING PROCEEDINGS

(Issued November 27, 1962)

Delete Docket No. "G-13961" from the heading of the order.

Appendix A to the order, page 1, the proposed settlement price for sales to Texas Eastern Transmission Corporation under Rate Schedule No. 70 should read "14.6" rather than "14.0", with deletion of the favored-nation provision from the contract, pursuant to Section VI of Pure Oil Company's Motion to Amend Settlement Proposal, filed November 5, 1962.

(Signed) Joseph H. Gutride
Joseph H. Gutride
Secretary

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

The Pure Oil Company, *et al.*

Docket Nos.
G-16790, G-17329, G-17541, G-17729, G-17731, G-17764, G-20283, G-13961, G-14050, RI60-100, RI60-345, RI61-331, RI62-72, RI62-204, RI62-210, RI62-456, RI62-482

ORDER APPROVING RATE SETTLEMENT PROPOSAL, AS AMENDED, PRESCRIBING REFUNDS, SEVERING AND TERMINATING PROCEEDINGS

(Issued November 27, 1962)

On April 16, 1962, at the request of Pure Oil Company (Pure) conferences were initiated by the staff of the Commission for the purpose of considering the settlement of the issues in the above-docketed proceedings. As a result of such conferences, Pure, on September 19, 1962, filed a petition for approval of its settlement proposal. Subsequent thereto, comments and objections were filed by certain intervenors, further conferences were held and as a result thereof Pure, on November 5, 1962, filed a motion, pursuant to § 1.12 of the Commission's Rule of Practice and Procedure, to amend its petition for approval of its settlement proposal.[1] No party has objected to the proposed settle-

[1] Each of the parties who had filed comments or objections to Pure's original proposal attended and actively participated in the conferences which resulted in Pure's amended proposal.

ment, as amended, and it is now before us for consideration.[2]

In summary, the settlement proposal provides:

(1) Pure's rates for sales of natural gas in interstate commerce, with one exception, shall be at or below the applicable area ceilings.[3]

[2612]

(2) A moratorium on increased rate filings until March 1, 1966, except that with respect to Rate Schedule No. 39, covering a sale by Pure to Transcontinental Gas Pipeline Corporation (Transco) in Vermillion Parish, Louisiana, the filing moratorium extends to July 1, 1967.

(3) For certain rate schedules, waiver of the right to file under indefinite pricing clauses, and limitation of rate increases to 1¢ per Mcf every five years, except for applicable tax-reimbursement clauses.

(4) Pure reserves the right to file at any time for contractually authorized increased rates up to the applicable area-rate levels determined through area hearing or by amendment of the Commission's Statement of General Policy No. 61-1.

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[2] On November 13, 1962, The United Gas Improvement Company (UGI) filed an answer to the amended proposal in which it suggested certain language changes. This order provides for substantially the same result as that proposed by UGI. On the same day, the Philadelphia Electric Company filed its response to the amended proposal in which it stated, *inter alia*, that Pure's proposal in the instance of one rate schedule contravened the Second Amendment to the Commission's Statement of General Policy No. 61-1. However, the proposal of Pure was amended by letter filed November 5, 1962, to conform to said amendment.

Neither the answer nor the response objected to or protested the amended proposal.

[3] The settlement proposal encompasses all of Pure's filed rate schedules except those for sales in the Permian Basin, presently involved in AR61-1, and two sales in the Oklahoma Panhandle which were excluded by agreement.

(5) Pure will refund to its purchsers under all rate schedules where collections were made subject to refund the difference between the revenues actually received and those which would have been received at the proposed settlement rate from September 1, 1962 to the date upon which the proposed rates are placed in effect, with interest at 6% or 7% per annum, as applicable. Additionally, under Rate Schedule No. 33, Pure will refund two-thirds (⅔ds) of the difference it has collected from Transco and that which it would have received at the proposed settlement rate from the date upon which said rate was increased above 17.75¢ per Mcf to the date upon which the proposed settlement rate is placed in effect. Under Rate Schedule No. 39 Pure will refund to Transco an amount equal to the difference between the monies paid and the settlement rate of 19¢ per Mcf of gas multiplied by the volumes sold and delivered to Transco under this rate schedule in June, 1962, and delivered in each preceding month thereto until a dollar amount results which is equal to two-thirds (⅔ds) of the difference between the amount paid to Pure by Transco for gas delivered from the date of initial delivery and the amount that Transco would have paid had a rate of 19¢ been charged and collected from said date. Also, under said Rate Schedule No. 39, Transco has paid for gas, under take or pay provisions in the contract, which it was unable to take. Pure proposes to refund the amounts charged for such gas not taken above the settlement rate in kind.

(6) The severance from the consolidated proceedings in Docket No. RI62-467, *et al.* of Pure's increased rate filing under its Rate Schedule No. 39 in Docket No. RI62-482 and a disallowance thereof.

In support of its proposal, Pure avers that the settlement rates, refunds, moratorium periods and other provisions thereof are in the public interest in that they are fair, non-

inflationary and will provide long-term price stability for large volumes of natural gas moving in interstate commerce. The proposal includes sales to twenty-four purchasers under forty-three rate schedules, such sales being made in nine states. The one proposed rate which exceeds the applicable area ceiling is for a sale which Pure contends has such unusual circumstances to cause it to be so unique as to warrant our granting an exception in this instance to the area ceiling.

[2613]

The only exception to settlement at ceiling levels or below, is the sale made to Tennessee Gas Transmission Company under Pure's Rate Schedule No. 40 from the Rollover Field, Vermilion Parish, offshore Louisiana. Pure states that it was among the first to explore for oil and gas on the Continental Shelf, offshore Louisiana. In 1949, after two wells had been drilled and abandoned on the Rollover leases, Pure brought in the discovery well. The well was ten miles offshore in forty feet of water. Pure instituted negotiations with every major transmission company in Southern Louisiana but was unable to interest any in initiating offshore operations. Pure states that at the time it was advised that the feasibility of an underwater pipeline for the necessary distance was very doubtful. After having exhausted all efforts to secure an interstate pipeline purchaser, Pure says it was approached in September, 1949, by Marine Gathering Company,[4] (Marine) then a paper corporation, which offered to purchase and transport the gas. Negotiations continued until March, 1950, when Pure executed a contract with Marine to sell it the Rollover gas at an initial price of 4.5c per Mcf (15.025 psia) in the field. Subsequently, Tennessee extended its trans-

[4] The name of Marine Gathering Company was changed to Commonwealth Oil Corporation, and recently Jupiter Oil Corporation succeeded to the interests of Commonwealth.

mission system to a point onshore of the Rollover Field and Marine laid the underwater line to connect with Tennessee's system.

Exploration and development of Rollover has increased the reserve estimates from 278 billion cubic feet as of April 9, 1951, to 879 billion cubic feet as of July 1, 1959. Pure states that if it had known the size of the estimated reserves, and if its leases had not been about to terminate, it would not have agreed to sell these large offshore reserves for 4.5¢ per Mcf. It states that these circumstances, coupled with the fact it could not interest a pipeline purchaser in pioneering an underwater pipeline, causes this sale to be in the nature of a distress sale.

At the present time, Pure makes the sale from Rollover directly to Tennessee onshore and pays Marine's successor a transportation fee of 4¢ for the first 62.5 MMcf per day transported and 3¢ on additional volumes. The present rate being charged is 21.3333¢ per Mcf, of which Pure retains 17.9¢ per Mcf. It proposes a settlement rate of 16.75¢ per Mcf, *plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein.* We believe that under all the circumstances the proposed settlement rate for this sale should be approved.

With respect to refunds, although the staff had undertaken a field investigation of Pure's books and records, such investigation was not completed, and no formal proceedings involving all of Pure's rates were held. Therefore, the parties to the settlement proceedings utilized a cost of service prepared by Pure. Pure avers the cost of service it presented was prepared generally according to the principles adopted **[2614]** by the Commission in its Opinion

338, *Phillips Petroleum Company, et al.*, Docket No. G-1148, *et al.*, 24 FPC 537. It says that the cost of service and supporting data were furnished to all parties to the settlement conferences, and that despite some "differences of opinion as to certain of the methodology employed in the study . . . they were not of such significance as to lead these parties to conclude that a requirement of refunds beyond those proposed would be just and reasonable." In view of all the terms of the settlement proposal, we find it appropriate that the refunds be made as proposed.

The settlement proposal includes a number of rates for which issuance of related permanent certificates is pending, and service is being rendered under temporary authorizations. Section 7 of the Act requires a hearing on such certificate applications. We propose, therefore, to promptly sever such proceedings from other proceedings where consolidated, and to set these certificate matters for abridged hearing, indicating that the proposed initial price is the settlement price. In the meantime, Pure shall charge and collect the settlement rates as of the date of this order, or if it elect to continue charging the present rate it shall forthwith file its undertaking agreeing to refund the difference between the present rate and the settlement rate collected by it, in each instance, from the date of this order to the date of the order issuing it a permanent certificate.

The instant settlement proposal as herein set forth, and in other particulars not specifically noted herein, meets the criteria previously set forth in our *Tidewater*, *Ohio* and *Shell* settlement orders,[5] and, accordingly we find it to be

[5] *Tidewater Oil Co., et al*, Docket Nos. G-13310, *et al.*, Order Conditionally Approving General Rate Settlement, issued June 15, 1962, ... FPC ....; *The Ohio Oil Co., et al.*, Docket Nos. R160-92, *et al.*, Order Approving General Rate Settlement Proposal and Terminating Proceedings, issued June 28, 1962, ... FPC ....; *Shell Oil Company, et al.*, Docket Nos G-9446, *et al.*, Order Conditionally Approving General Rate Settlement Proposal, Severing Proceedings, Terminating Proceeding and Requiring Refunds, issued August 1, 1962, ... FPC .....

in the public interest and should be approved as hereinafter provided.

Our action herein should not be construed, nor may it be, as constituting approval of any future rate increase, if any, that may be filed under the subject rate schedules, and is without prejudice to any findings or order of the Commission in any further proceedings, including area rate proceedings, involving Pure's rates and rate schedules.

The Commission orders:

(A) The settlement of these proceedings on the basis of the settlement proposal is approved and made effective subject to the following terms and conditions.

[2615]

(B) The settlement rates set out in Appendix A hereto, are approved and shall be effective as of November 1, 1962, and all rates and charges which exceed such rates are hereby disallowed.

(C) The certificate proceedings indicated in Appendix A hereto shall not be terminated on the basis of the settlement, but shall be determined after hearing.

(D) Within 30 days from the date of this order, Pure shall make such filings under its rate schedules as are required to make effective the terms of the settlement proposal as modified herein.

(E) Within 30 days after acceptance of the applicable rate schedule supplements referred to in Paragraph D hereof, Pure shall (1) refund, with interest as specified in each docket, the difference between the rates collected subject to refund on and after September 1, 1962, and the related settlement rates; and shall make the required refunds under its rate schedule Nos. 33 and 39; nd (2) report to

the Commission, in writing, and under oath, the amount of refund made to each of its purchasers, showing separately the amount of principal and interest so paid, and the bases used for such determination, together with releases from its purchasers showing receipt of the refunds in conformity to the settlement as modified and approved.

(F) Upon full compliance by Pure with all the terms and provisions of this order, the 4(e) proceedings listed in Appendix A hereof shall terminate. Docket Nos. G-14050, G-16790, G-17729, G-17764 and RI61-331 are hereby severed from the consolidated proceedings in Docket No. AR61-2, *et al.*, and Docket No. RI62-482 is hereby severed from the consolidated proceeding in Docket No. RI62-467, *et al.*

(G) This order is without prejudice to any findings or orders which have been, or may be, made hereafter by the Commission, and is without prejudice to claims or contentions which may be made by Pure, the Commission staff, or any affected party herein, in any proceedings now pending, or hereafter instituted by or against Pure, or any other companies, person, or parties affected by this order.

By the Commission.

[SEAL]

/s/ JOSEPH H. GUTRIDE
Joseph H. Gutride,
Secretary.

THE PURE OIL COMPANY

PROPOSED RATES

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4) ¢	Proposed Settlement Price[1] (5) ¢	Section 4(e) Docket No. (6)
Texas Railroad Commission District No. 2					
United G.P.L. Co.	Blanconia	5	15.9	14.6	R162-72 [2]
Texas Eastern Trans. Corp.	Vienna	70	15.2	14.0	R162-204[3]
Texas Railroad Commission District No. 3					
United G.P.L. Co.	Fostoria	51	15.192	15.192	
Texas Railroad Commission District No. 4					
Coastal Trans. Corp.	Sharyland	47	16.0	16.0	Excluded from Settlement Well plugged & abandoned Pure will file for abandonment
Texas Railroad Commission District No. 6					
Texas Gas Trans. Corp.	Carthage	2	10.6176	10.6176	
Natural G.P.L. Co. of America	Bryans Mill	73	15.0	15.0	[4]

[2617]

Purchaser (1)	Field (2)	No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
Texas Railroad Commission District No. 9					
Lone Star Gas Co.	Big Mineral Creek	71	14.0	14.0	
Texas Railroad Commission District No. 10					
Phillips Petroleum Co.	Hugoton	19	12.0	11.0	R160-345[5]
North Louisiana					
Southwest Gas Producing Co.	Hico-Knowles	24	14.98	14.98	
Arkansas Louisiana Gas Co.	Haynesville	55	11.796	11.796	
United G.P.L. Co.	Cotton Valley	56	13.05076	13.05076	
United G.P.L. Co.	Sligo	58	11.7752 @16.7 psia	11.7752 @16.7 psia	
Texas Gas Trans. Corp.	Hico-Knowles	64	18.25	18.25	
United G.P.L. Co.	Terryville Ruston	65	18.75	18.75	
Arkansas Louisiana Gas Co.	Calhoun	67	18.75	18.75	
		[2618]			
South Louisiana					
United G.P.L. Co.	Eugene Island	10	12.50286 @16.7 psia	12.50286 @16.7 psia	
Socony Mobil Oil Co., Inc.	West Gueydan	11	22.55	15.75	R161-331[6] G-17764 G-14050
Transcontinental G.P.L. Corp.	Gueydan & S.E.	33	23.56	17.75	G-17541 [7] G-17729

Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
			¢	¢	
Transcontinental G.P.L. Corp.	Block 76 (66)	39	21.4	19.0	RI62-482 [8]
Tennessee Gas Trans. Co.	Rollover Block 39	40	17.9+Trans.	16.75+Trans.	G-16790 [9]
Tennessee Gas Trans. Co.	Lake Pelto	75	21.25	20.625	
Mississippi					
Olin Gas Trans. Co.	Carthage Point	13	10.0@ 15.225 psia	10.0@ 15.225 psia	
Oklahoma					
Panhandle Area					
Colorado Interstate Gas Co.	Keyes (Francis Unit)	36	16.0	15.0	G-17329
Michigan Wisconsin P.L. Co.	Laverne	48	17.0	17.	Excluded from[10]
Michigan Wisconsin P.L. Co.	S.E. Lovedale & Dotter	68	17.0	17.0	Settlement[11]
Colorado Interstate Gas Co.	Mocane	36 [2619]	15.0	15.0	RI62-456[12]
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Lone Star Gas Co.	Velma Springer	45	16.8	11.0	RI60-100
Natural G.P.L. Co. of America	West Cement	46	15.0	15.0	[13]
Wunderlich Development Co.	Ponca City	53	6.2	6.2	
Lone Star Gas Co.	Caddo Dome	66	14.25	14.25	[14]
Lone Star Gas Co.	Doyle	72	10.0	10.0	
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Purchaser (1)	Field (2)	RS No. (3)	Present Price[1] (4)	Proposed Settlement Price[1] (5)	Section 4(e) Docket No. (6)
Kansas			¢	¢	
Northern Natural Gas Co.	Harper Ranch (Nat.)	34	16.0	15.0	RI62-210
Northern Natural Gas Co.	Harper Ranch (Csg.)	35	15.0	14.0	RI62-210
Cities Service Gac Co.	South Rhodes	44	13.0	12.0	G-20283
Panhandle Eastern P.L. Co.	Wil	63	15.0	15.0	
Colorado					
Kansas Nebraska N. G. Co., Inc.	Doll	49	10.9938	10.9938	
		[2620]			
Utah					
El Paso N. G. Co.	Aneth	37	17.7	17.7	
Wyoming					
Montana Dakota Utilities Co.	Worland	14	10.5	10.5	
Socony Mobil Oil Co., Inc.	Manderson	29	—	—	18
West Virginia					
Hope Natural Gas Co.	Cabin Creek	7	28.96	26.88	G-17731
United Fuel Gas Co.	Elkhurst	8	16.0@ 15.325 psia	16.0@ 15.325 psia	

Pure's Pending Dockets Included In Settlement For Which Permanent Certificates Have Not Been Issued

Docket No.	RS No.	Proposed Settlement Price[1]
CI61-1791	70	14.6
CI62-634	73	15.0
CI62-1224	75	20.625

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[1] Louisiana, Colorado, Utah, West Virginia and Wyoming prices at 15.025 psia with all other prices at 14.65 psia unless otherwise noted. All prices are base prices plus tax reimbursement (if any) unless noted.

[2] Proposed settlement rate of 14.6¢ is patterned after FPC General Policy Statement as amended. Price redetermination clause is to be removed and provision made for 1.0¢ periodic escalation every 5 years.

[3] Temporary authorization issued at Docket No. CI61-1791 with price at 15.0¢ conditioned to rate to be determined when permanent certificate issued. Initial rate at Docket No. CI61-1791 contains a floor price of 13.5¢.

[4] Temporary authorization issued at Docket No. CI 62-634 conditioning initial rate from 18.0¢ to 15.0¢. Initial delivery 3-20-62.

[5] Application for abandonment being prepared as sale s in intrastate commerce.

[6] Proposed settlement price shown is before deductions for gathering on both low and high pressure gas and compression on low pressure gas.

[7] Base rate of 16.0¢ plus 1.75¢ tax reimbursement.

[8] A notice of increase (Supplement No. 1) was filed in this docket to 23.4¢ per Mcf and was suspended to Dec. 1, 1962. Opon acceptance of settlement proposal Supplement No. 1 will be superseded by the proposed 19¢ rate before the 23.4¢ rate ever becomes effective.

[9] Jupiter Oil Corporation charges Pure for transportation from the field (10 miles offshore) to Tennessee Gas Transmission Company main line on shore. The charges are 4.0¢ per Mcf (16.7 psia) for the first 62.5 MMCFD and 3.0¢ per Mcf (16.7 psia) for the remainder. These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure.

[10] Permanent certificate issued at Docket No. G-18861 for an initial rate of 17.0¢ plus BTU adustment. aLter amendments adding acreage to contract have received temporary certification conditioned to rate to be determined in certificate proceeding with a floor of 17.0¢. Rates as to this additional acreage

[11] Temporary authorization issued conditioning initial rate to be that rate as determined in certificate proceeding. Collecting 17.0¢ plus BTU adustment with a floor price of 17.0¢. Rate will await outcome of certificate proceeding.

[12] Present price and proposed settlement price is 15.0¢ plus BTU adustment and is Pure's firm initial rate. There is a change in the rate at Docket No. RI62-456 suspended until 11-4-62 for an increase to 17.0¢ plus BTU adjustment which will be suspended if the settlement proposal is accepted.

[13] This rate also has a BTU adjustment for gas above and below 1,000 BTU.

[14] Base rate is 14.0¢ at 14.65 psia. Pure is collecting .25¢ for dehydration. This is an initial rate. permanently certificated.

[15] Application for abandonment filed 4-11-61 and assigned Docket CI61-1499. No money collected subject to refund.

• • • •

(3126)

CAPTION

[3126]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

The Jupiter Corporation Tennessee Gas Transmission Company	Docket No. RI63-212 Docket No. CP63-212

(Issued January 5, 1966)

PRESIDING EXAMINER'S INITIAL DECISION ON A RATE INVESTIGATION OF THE JUPTER CORPORATION AND ON A RELATED CERTIFICATE APPLICATION OF ITS PIPELINE BUYER

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APPEARANCES

Howard R. Koven, Justin R. Wolf, Eugene E. Threadgill and *William W. Brackett* for The Jupiter Corporation

William C. Braden, Jr., and *B. J. Williamson* for Tennessee Gas Transmission Company

J. Harry Mulhern, Edward S. Kirby and *James R. Lacey* for Public Service Electric & Gas Company.

Edward M. Garrett, Bertram D. Moll and *Morton L. Simons* for Long Island Lighting Company.

Kenneth Heady, John R. Rebman and *Stanley L. Cunningham* for Phillips Petroleum Company

Lynn Adams for Kerr-McGee Oil Industries, Inc.

Kent H. Brown and *Charles J. Cox* for New York State Public Service Commission

Francis J. McShalley for the Staff of the Federal Power Commission

I

NATURE OF THE CASE

ELLIS, PRESIDING EXAMINER:

Combining a certificate application and a rate investigation, this proceeding is—(a) an inquiry under Section 5

of the Natural Gas Act into the rates charged by The Jupiter Corporation for the service of transporting gas to the Louisiana shore from points 9 miles in the Gulf, (b) a like inquiry into Jupiter's sales rate for other gas it purchases at sea and resells on shore, and (c) an application of the pipeline buyer for the certification of its proposal to lease Jupiter's pipelines at a flat, monthly rental, and operate them thereafter for its own account.

The questions and objections raised include—(1) whether Jupiter's carriage of gas ashore for the account of the producer is a gathering function exempted by law from regulation; (2) whether its purchase-transportation-resale operation is in essence a gathering function likewise exempted; (3) if Jupiter is found to be subject to regulation, whether its revenues and return must be appraised on the basis of its total gas and oil business, including production activities in other areas; (4) the disposition of state severance tax remburserment funds collected to date from the pipeline buyer but not remitted to the producer or to the state taxing authority; and (5) as to the certificate application (contemplating an assignment of the transportation activity to the pipeline buyer), whether the proposed rental price for the line is excessive.

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II

PROCEDURAL RECORD

This proceeding developed according to the following schedule:

December 5, 1962: Commission order in RI63-212 instituting investigation of the gas transportation rates charged by Jupiter.

December 17, 1962: Notice of intervention of Public Service Commission of the State of New York.

April 17, 1963: FPC order permitting intervention of: Public Service Electric & Gas Co.; The Brooklyn Union Gas Co.; and Long Island Lighting Co.

August 28, 1964: Tennessee Gas Transmission Company's application for a certificate of public convenience and necessity (CP65-58).

October 30, 1964: FPC order consolidating proceedings, providing for hearing, fixing date of prehearing conference and prescribing procedure.

November 12, 1964: Motion of Tennessee Gas for extension of time in which to submit prepared testimony and exhibits.

November 20, 1964: FPC's notice of extension of time in re Tennessee Gas Transmission Co.'s motion of November 12.

November 23, 1964: Notice of intervention of Pennsylvania Public Utility Commission.

December 2, 1964: FPC order permitting intervention of: Long Island Lighting Company; Public Service Electric and Gas Company; and Phillips Petroleum Company and Kerr-McGee Oil Industries, Inc., jointly.

December 8, 1964: Staff testimony and exhibits received.

December 8, 1964: Tennessee Gas testimony and exhibits received, also first supplement to its application.

December 16, 1964: Jupiter's motion for extension of filing dates.

December 16, 1964: Jupiter's motion to terminate, proposing a basis of settlement.

December 22, 1964: Jupiter's statement correcting motion to terminate.

December 24, 1964: Answer of Long Island Lighting Company in opposition to motions to terminate and to extend filing dates.

December 28, 1964: Answer and objection of Staff Counsel to motion to terminate proceeding.

December 29, 1964: FPC's notice of further extension of time.

January 6, 1965: Jupiter's petition for declaratory judgment order and motion to dismiss proceedings in Docket No. RI63-212:

Motion for continuance;

Motion for oral argument;

Jupiter's alternative motion to sever and to stay.

January 11, 1965: Jupiter's addendum to petition for declaratory order.

January 18, 1965: FPC's notice of further extension of time.

January 18, 1965: FPC order denying petition to terminate proceedings.

January 18, 1965: Joint answer by Phillips Petroleum Co. and Kerr-McGee to alternative motion to sever and to stay and to petition for declaratory order and motion to dismiss proceedings in RI63-212.

January 18, 1965: Answer of Long Island Lighting Co. to motions of The Jupiter Corporation.

January 26, 1965: Motion for continuance by Jupiter.

January 26, 1965: Petition by Jupiter for rehearing of order of January 18.

February 2, 1965: Answer and objection of Commission Staff to petition for declaratory order and alternative motion to sever and stay proceedings.

[3130]

February 3, 1965: FPC order granting in part Jupiter's motion of January 26, for continuance.

February 8, 1965: Motion for continuance by Jupiter.

February 12, 1965: FPC order denying motion of February 8.

February 12, 1965: Complaint for declaratory order or injunction filed by Jupiter against FPC in the United States Court for the Northern District of Illinois.

February 15, 1965: FPC order denying motion of January 26, for rehearing.

February 18, 1965: FPC order deferring action on petition for declaratory order and motion to dismiss proceedings (1/8/65) in Docket No. RI63-212, and denying alternative motion to sever and stay proceedings, and motion for oral argument. Also extending filing dates, provided Jupiter wires by the next day that they will file their testimony within the 30-day period.

February 19, 1965: Jupiter's telegram stating they will appear in the U. S. District Court on February 23.

February 23, 1965: District Judge Will dismissed Jupiter's complaint for injunction and order.

February 26, 1965: FPC order further extending time for filing and serving of evidence and for prehearing conference.

February 26, 1965: Combined motions and petitions for rehearing filed by Jupiter.

March 1, 1965: Testimony and evidence of interveners Kerr-McGee Oil Industries, Inc., and Phillips Petroleum Company received.

March 2, 1965: Telegram from Jupiter urging the Commission to rule upon petitions for rehearing.

March 10, 1965: Jupiter's motion to dismiss proceeding in Docket No. RI63-212, or else to consolidate with Southern Louisiana area rate case.

March 10, 1965: Jupiter's motion for continuance.

March 12, 1965: FPC order denying petition for reconsideration and motions for continuance, also rejecting rehearing for denial of declaratory order.

[3131]

March 23, 1965: Answer of Commission Staff to Jupiter's motion to dismiss.

March 24, 1965: Reargument before U. S. Court for Northern District of Illinois.

March 25, 1965: Testimony and evidence of Jupiter received, in part.

April 9, 1965: Jupiter filed final testimony and exhibits.

April 13, 1965: Prehearing conference before Examiner.

April 23, 1965: Complaint for injunction filed by Jupiter against FPC in the U. S. Court for the Southern Division of Texas.

April 29, 1965: FPC order denying motion to dismiss proceedings (Jupiter's motion of 3/10/65).

May 3, 1965: Injunction complaint denied by U. S. Court for Southern Division of Texas.

May 3, 1965: Jupiter's motion to the Examiner to dismiss proceedings and terminate investigation, and to recess proceedings pending the certification of the motion to the Commission for decision.

May 11, 1965: Seven days of hearing concluded.

May 18, 1965: Exhibit J-19 received.

June 1, 1965: Exhibit J-18 received.

June 15, 1965: Joint brief of distributor interveners filed, and endorsed by New York Public Service Commission.

June 16, 1965: Initial brief of Commission Staff received.

June 17, 1965: Initial briefs of Phillips and Kerr-McGee received.

July 15, 1965: Initial briefs of Jupiter and Tennessee Gas received.

August 5, 1965: Motion of Phillips and Kerr-McGee for leave to file reply to initial brief of Jupiter.

[3132]

August 5, 1965: Reply brief of Commission Staff received.

August 11, 1965: In another docket not here consolidated the sale by Phillips and Kerr-McGee to Jupiter was certificated effective July 23, 1964, the inital price not to exceed 18.5 cents and the temporary certificate for Jupiter's sale

to Tennessee, issued in 1962, was amended to limit the price to 20.9 cents per Mcf effective July 23, 1964. Opinion No. 470, G-16611, G-16679 *et al.*

August 13, 1965: Presiding Examiner's ruling denying Phillips and Kerr-McGee's motion of August 5, 1965.

III

JUPITER'S TRANSPORTATION OF GAS FOR PURE'S ACCOUNT

1. ***Jupiter's dual program:*** The Jupiter Corporation owns two parallel pipelines which bring gas ashore, from platforms ten miles out in the Gulf to a point on the Louisiana shore connecting with the lines of the Tennessee Gas Transmission Company. The mechanics of the operation are explained in Chapter B below, but it is first necessary to distinguish the separate and disparte programs under which Jupiter takes gas from two producers, commingles much of it, and accomplishes the delivery from sea to shore. First—both in time and quantity—Jupiter acts as transporter for the account of one of the producers, the Pure Oil Company, which sells and delivers to Tennessee.

Jupiter's contract is with the producer (Pure), not with Tennessee, and Jupiter's function is to transport the product of the wells and collect a fee, averaging 3.4 cents per Mcf for so doing. Also, in its plant ashore, Jupiter separates out the liquid oil droplets, called condensate, for Pure. In its other program, but in part through the same facilities, Jupiter purchases gas at the platform of the other producer (Kerr-McGee Oil Industries and Phillips Petroleum Company acting jointly), brings it to shore and there separates and re-sells it to Tennessee.

So what is in issue in this "Section 5" rate investigation is two separate rates—the transportation charge in the case of the gas from Pure and the resale price in the case of the gas from Kerr-McGee and Phillips ("K-M-P"). The essence of the controversy is in these three figures: Jupiter charges Pure 3.4 cents per Mcf transported, and Jupiter's margin on the resale of the K-M-P- gas is 2.4 cents, meaning the resale price to Tennessee minus Jupiter's purchase price from K-M-P. These are averages obtained from the 1962 volumes, and for that [3133] year the Commission Staff has computed a cost of service at just .518 cents per Mcf. The recommended reduction of rates—from 3.4 cents and 2.4 cents to .518 cents—would mean a reduction in net revenues per year from $1,940,000 to only $270,000, effective, of course, prospectively only. The annual difference, $1,670,000, the staff calls excess revenues: its loss Jupiter says would be drastic, indeed disastrous.

Jupiter defends on all fronts, jurisdictional, legal, accounting and otherwise, and, pointing to its losses in gas and oil exploration in other areas, responds that its overall net revenue is reasonable and quite unexceptionable. Finally—but not said to be in confession and avoidance—Jupiter has arranged to lease their lines and plant in entirety to Tennessee for $1,200,000 per year, and Tennessee's application for a certificate to license that operation is part of this case under Docket CP65-58.

2. ***Pioneering history of Jupiter's service:*** Neither the jurisdictional nature of Jupiter's service, nor the fair rate for it, can be adjudged without an appreciation of its pioneering history, back to 1950. Jupiter is the corporate successor to Commonwealth Oil Corporation, and Commonwealth was the nominal successor to Marine Gathering Company, a small organization developed specifically as the first transporter of Gulf of Mexico gas to the mainland

shore. As the Commission explained in its order on Pure's recent rate settlement (where Pure, in the special case of this sale, was allowed a rate said to exceed the area guideline ceiling.)[3]

> ". . . Pure states that it was among the first to explore for oil and gas on the Continental Shelf, offshore Louisiana. In 1949, after two wells had been drilled and abandoned on the Rollover leases, Pure brought in the discovery well. The well was ten miles offshore in forty feet of water. Pure instituted negotiations with **[3134]** every major transmission company in Southern Louisiana but was unable to interest any in initiating offshore operations. Pure states that at the time it was advised that the feasibility of an underwater pipeline for the necessary distance was very doubtful. After having exhausted all efforts to secure an interstate pipeline purchaser, Pure says it was approached in September, 1949, by Marine Gathering,[4] (Marine) then a paper corporation, which offered to purchase and transport the gas. Negotiations continued until March, 1950, when Pure executed a contract with Marine to sell it the Rollover gas at an initial price of 4.5c per Mcf (15.025 psia) in the field. Subsequently, Tennessee extended its transmission system to a point onshore of the Rollover Field and Marine laid the underwater line to connect with Tennessee's system."

For Jupiter, testimony on the risks and ventures in this new operation came from its Vice-President, G. B. Liese, who had been president of the predecessor companies, Marine and Commonwealth. At 1T96 he said:

[3] Order dated November 27, 1962, G-16790, 28 FPC 889, 891.

[4] The name of Marine Gathering Company was changed to Commonwealth Oil Corporation, and recently Jupiter Oil Corporation succeeded to the interests of Commonwealth.

"In 1949 it was well known in the oil and gas community that Pure had brought in several lush gas wells from its platform in the Rollover Field about 9 miles from the Louisiana coastline. There was considerable speculation at the time about the amount of reserves which could be tapped in the general area, but most indications were that the reserves were substantial. Speculation of this character was reinforced by Pure's continuing to drill wells from its Rollover platform to determine the limits of the field even though there appeared to be no market for the gas in the foreseeable future. In any event, the existence of this shut-in gas for which there was no market was common knowledge in the trade. It was equally well established that otherwise commercial quanities of gas were worthless unless the gas could be gathered for delivery to a market. Pure was faced with just such a problem with the Rollover Field. At that time there ws no such thing as an offshore **[3135]** gas gathering line. While the industry had some experience in laying pipelines across rivers and in shallow lakes and coastal waters, it had no experience whatsoever with the unprotected, open Gulf. A line to gather gas from the Pure platform would have to be laid in water up to 50 feet deep. No one knew how best to protect the pipe from corrosion and barnacles or from boat anchors, or just what techniques or equipment would be necessary in laying and burying the pipe. In addition, it was clear that the constant wave and tidal action, strong currents, and seasonal squalls, storms, and hurricanes common to this area of the Gulf, would pose serious threats not only to a successful installation of the line but also to its maintenance and operation. In brief, then, Pure had a problem in 1949-1950 to which the industry at the time had no ready answer. The gravity of the risks involved in

> solving this problem is best evidenced by the fact that the well-established producing and transportation companies, with great capital and engineering resources, were unwilling at the time to attempt construction of the required gathering facilities."

Numerous trade journals are quoted: Oil and Gas Journal refers to Marine (now Jupiter) as "the world's first ocean-going gas pipeline." New methodologies were required, all obviously experimental and uncertain, both for laying the lines six feet below the ocean bottom and for permanent protection from marine organisms, tides, storms, ship anchors and other hazards to avoid which the industry had as yet no charted guides.

The operation succeeded, and deliveries began under the first arrangement contracted in 1950, when Pure sold to Marine (Jupiter) and Marine resold to Tennessee. In 1958 the resale arrangement was dropped and Pure began its direct sale to Tennessee, with Marine-Commonwealth-Jupiter acting as transporter, and Tennessee assuming the gas purchase contract with Pure.[2] Jupiter's fee was then

[3136]

fixed at 4 cents Mcf for the first 62,500 Mcf per day and 3 cents for any in excess. Current (1962) average is 3.4 cents. The transportation proposal was certificated on July 25, 1958, in Docket No. G-2692, G-12,583, and the contract, Jupiter's Rate Schedule No. 7, became a subject of this

[2] For the discussion of the "gathering" exemption in Chapter V, below, it is of interest that Pure's 1957 agreement with Marine calls for the point of delivery from Pure to Marine (really the pickup point), as to any new field discoveries, to be "at a central point in each such field." (Page 19 of contract in docket G-12,583.) It is only from and beyond that "central point" that Jupiter's function — now claimed to be "gathering" — actually begins.

investigation by the Commission's order of December 5, 1962, RI63-212, which began this case.

In the meantime Pure's final rate to Tennessee for the gas now sold by Pure direct to Tennessee, but transported to shore by Jupiter for the account of Pure, underwent considerable change, as shown in the following progression:

1950: Pure sold to Marine at 4.5 cents and Marine, after shore delivery, resold to Tennessee at 9.2263 cents.

1957: Marine's resale contract with Tennessee was assigned to Pure and Pure began its direct sale to Tennessee.

1957: Pure's new direct contract with Marine-Commonwealth-Jupiter became effective, with Pure agreeing to pay, at its own expense, a "gathering" or delivery charge which averages 3.4 cents.

1958: Pure filed an increase in its total, delivered-on-shore rate to Tennessee at 21.3333 cents, which was suspended by FPC's notice dated October 29, 1958, (G-16790), and became effective subject to refund. Thus Pure's net, after the rate increase, became 21.3333 cents minus 3.4 cents, or 17.9333. Marine's revenue at 3.4 cents was to remain steady, unaffected by Pure's sale price.

1962: Pure's tentative increase in sales rate to 21.3333 cents became the subject of a rate settlement proceeding reported in 28 FPC 889, from which the quotation on pages 8 and 9 above is taken. Pure proposed a two-element rate, viz.: (a) 16.75 cents Mcf plus (b) whatever transportation fee Pure is charged by Jupiter, or 3.4 cents. The rate settlement order, approving the combined and agreed-to rate of 16.75 cents plus transportation costs incurred, contains the following footnoted stipulation and understanding, taken from 28 FPC 889 at 895:

"Jupiter Oil Corporation charges Pure for transportation from the field (10 miles offshore) to Tennessee Gas Transmission Company main line on shore. The charges are 4.0 cents per Mcf (16.7 psia.) for the first 62.5 MMCFD and 3.0 cents per Mcf (16.7 psia.) for the remainder. These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure."

[3137]

Thus, since the rate increase settlement, Tennessee has paid Pure 16.75 cents plus an average of 3.4 cents, or 20.15 cents, and Pure has been paying Jupiter the 3.4-cent transportation charge and retaining the balance. Hereafter, when Jupiter's rate changes on the effective date of the order below, Tennessee's cost will be affected accordingly, see Chapter IX below.

IV

JUPITER'S RESALE OF KERR-McGEE-PHILLIPS GAS

The other rate of Jupiter under investigation in this "Section 5" case is that for its resale to Tennessee of gas Jupiter buys at the platform in the Gulf from K-M-P. It is the rate margin between its cost and selling prices that is under inquiry. The background is this:

Kerr-McGee and Phillips Petroleum Company jointly own and operate a number of gas wells 10 miles off the Louisiana shore. Through several inter-connected underwater flow lines, they gather the gas at a marine platform about a mile from Pure's. At this point the two producers sell it to Jupiter, which brings it to shore, commingled with some of Pure's gas. At Jupiter's separation plant 29 miles

inland, Jupiter delivers and sells it to Tennessee.[3] The arrangement began in 1953, not long after the Pure transportation service had begun, but the contract procedure has been quite different.

Except for a brief, interim sale to Tennessee by Marine (later Jupiter), for some years the resale actually was to a Canadian concern, Niagara Gas Transmission, Limited. but physical delivery by Jupiter was made on shore to Tennessee for transportation by Tennessee to the Canadian border for the account of Niagara. For that reason, the sale and resale were then treated by FPC as non-jurisdictional, and the various parties' applications for certificates and rate filings were returned without action. See Opinion No. 470 of August 11, 1965 in Phillips. G-16.611.

[3138]

By 1958, Niagara had arranged for gas elsewhere and accordingly assigned the gas purchase contract to Tennessee, effective November 5. In the meantime, the various prices had escalated, and the resale price now payable by Tennessee became 21.3333 cents (plus a tax reimbursement item which is treated below in Chapter X). The certificate application for the sale to Tennessee became involved in a number of proceedings, none of which became final until the Commission's opinion of August 11, 1965, No. 470, just cited, which (a) issued a final certificate to Phillips and Kerr-McGee for their sale to Jupiter at an initial price limited to 18.5 cents effective July 23, 1964, (formerly

[3] Eight and a half miles further inland a processing plant of the Phillips Company athwart Tennessee's line came into operation in July, 1962 and began to remove some of the hydrocarbons from the gas stream. The avails of this operation (as to the K-M-P gas) are split, with 30 percent going to Jupiter, amounting to $82,200 for an entire year, based on the figures for the rest of 1962. Exhibit ?, Schedule 2, line 11.

21.3333 cents minus 2.4 average, or 18.9333 cents), and (b) withheld decision on a final certificate for Jupiter's resale to Tennessee, but amended the temporary certificate for that sale (order of May 24, 1962 in G-16,679) to limit the resale price to 20.9 cents as of July 23, 1964 (instead of 21.3333 plus tax reimbursement). Since that decision is in a docket not here consolidated, and came after this record closed, it is not disclosed what price adjustments have been made in fact as a result of it.

Technically, what is before the forum is the reasonableness of Jupiter's price to Tennessee, i.e., 21.3333 cents plus tax but now presumably 20.9 cents gross, since that is the source of Jupiter's revenues. It is the jurisdictional sale whose price is for rate control here and as such is the subject matter of Jupiter's Rate Schedule No. 8 here under investigation. Actually, however, what is really in issue is the reasonableness of the margin, now 2.4 cents, between that sale price and the price Jupiter pays to the two producers. At the hearing, the complication developed that the Commission's case is said to be wrongly addressed because, under the purchase contracts with the producers, Jupiter's purchase price moves up or down according to any change in their sale rate to Tennessee. Hence the order, it is said, will not affect Jupiter's net margin. This detail is treated in Chapter BIII below.

Physically the gas is treated alike and travels the same route as Pure's gas, see Chapter V below, which gives rise to the involved claim, really a metamorphosis, to the effect that Jupiter's is functionally only a transportation service to deliver the gas sold by the producers to the pipeline, the same as their arrangement with Pure, and should be equally free of regulation on the claim it is "gathering" exempted by the law. Jupiter wants to be known as agent for the Sellers, not as an independent buyer and re-seller, a de-

scription which belies quite a number of verified rate and certificate application filings by Jupiter since 1954. All of these have been consistent in describing **[3139]** the resale for what it is. This new-found agency status comes also with some surprise to their alleged principals—K-M-P, who supposed all this time they were selling to Jupiter,[4] and who admit no responsibility for the gas after they deliver it to Jupiter at sea. Neither does it appear to be Tennessee's conception of the transaction (Brief, page 2).

This recasting of a dozen or more formal documents, to make a sale not a sale but something else, might be called for in other connections if the paper appearances were seen to be illusory *and* if they were so drafted for the very purpose of escaping Federal regulation of interstate commerce.[5] Here, rather than closing a loophole, the reformation is sought for the purpose of making one. As such it has the benefit neither of reason nor of precedent.

Anyway, as developed in Chapter V, the physical service by Jupiter is not exempt gathering but jurisdictional transportation, and the charge for it is equally subject to the law's enjoinder that it must be just and reasonable to be lawful, hence the claim is moot and irrelevant.

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[4] From K-M-P's Brief at page 6:

> "This is a purchase and sale as much as any of the contracts of the producers in the offshore Louisiana area are purchases and sales. All the rights of ownership to the gas are transferred to Jupiter at the Phillips offshore platform . . . Jupiter treats the transaction as a purchase and sale on its books (Tr. 424). Jupiter witnesses Davis (Tr. 592) and Liese (Tr. 732) characterized the transaction as a sale. Therefore, not only do the full rights of ownership pass to Jupiter at the offshore platform, but the parties intended the transaction to be a purchase and sale and treat it as such in their every-day operations."

[5] *Red Ball Motor Freight* v. *Shannon* (1964) 377 U.S. 311.

V

IS THE TRANSPORTATION EXEMPT FROM THE LAW AS "GATHERING"?

Jupiter makes many arguments, but none more seriously than the claim that all of its service, from beginning to end, is legally, practically, and economically a gathering service which puts it quite outside the purview of the Commission's jurisdiction. If so, this would call for dismissal of the entire case and the cancellation of its permanent certificate to transport gas for Pure. As to the resale function in the case of the K-M-P gas, if there be acceptance of Jupiter's view, rejected in Chapter IV above, that the two sales contracts should be reformed and read to comprise merely a transportation arrangement for the producers, then it would also call for cancellation of its temporary certificate to sell K-M-P gas to Tennessee, and the withdrawal of its rate schedule filings. The point made requires detailed analysis because any jurisdiction question is fundamental; also no two "gathering" cases seem to be quite alike, and the several precedents have such terminology as "central point" and "main line", which may or may not have the same meaning here.

The legal question must be noted before the facts can be appreciated. The operative portions of the Natural Gas Act, Sections 4 and 7, cover only two activities, sales and transportation of gas in interstate commerce. For the coverage of those key words the referent is Section 1(b), which delineates the two subjects as sales in interstate commerce of natural gas for resale and transportation of gas in interstate commerce (which might or might not include the transportation aspect of the gathering process); but the same sentence exempts the activity of production and

the activity of gathering.[6] The remaining specific requirements of Section 1(b) are not involved since all of the gas is headed toward Tennessee's great interstate system and, as such, it is obviously "for resale" and "in interstate commerce." *Shell Oil Co.* v. *F.P.C.* (CA5, 1957) 247 F. 2d 900.

[3141]

The facts of the operation: As an aid to the Commission's inquiry into the facts of their service, Jupiter favored the hearing with the testimony of their superintendent of gas gathering and processing operations, Mr. Davis, who supplied for the record the map of their system, which is reproduced herewith, both in full to show its entire length and with an enlarged detail of the seaward end. As a result, the record is clear and the facts, as outlined below, are believed to be undisputed. The contrasting claims to be considered are these: (a) the Staff's view that gathering ends at the platforms "A" 10 miles at sea, which is the point where Jupiter's service begins; (b) Jupiter's view that gathering extends 29 miles inland, beyond the end of their pipes which stop at the shore, to the point of their separation plant's outlet. The impact of the two views is made plain by Jupiter's Exhibit 18, which is the source of the map printed herewith and shows the several segments of the total facility, as follows:

(a) *The establishment at sea:* Eight to ten miles out in the Gulf of Mexico from the shore of Louisiana there are two clusters of gas wells drilled by Pure and K-M-P, all apparently within a two-mile or so radius, about 17 wells in all. There are several satellite "platforms" or structures,

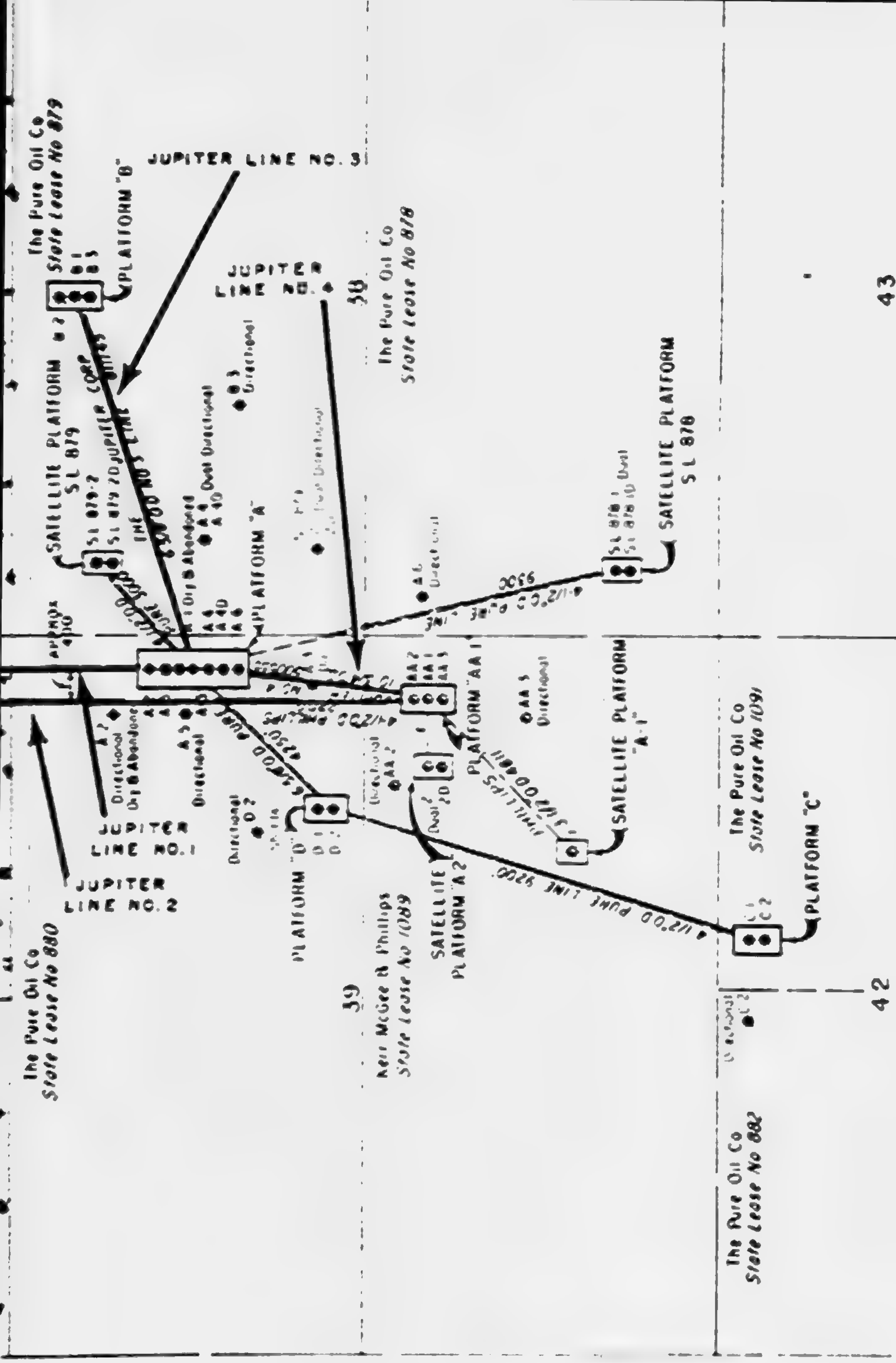
[6] Note the exemption does not mention facilities for gathering, which gives point to the cases that hold that the same facility may be jurisdictional for one purpose, such as transportation or sale, but exempt insofar as it is used for another purpose, such as gathering. *Saturn* v. *F.P.C.*, 250 F. 2d 61.

and two main or central ones, one for each producer, located a mile apart. They, that is the central platforms "A", act as the two hubs of the system, and into each the individual well lines converge, not unlike the spokes of two wheels, or else the wells themselves feed directly to the platforms. Thus five wells come up directly to Pure's platform A and two well lines lead in from a little distance off.

The platforms are very substantial structures, with a quantity of equipment and evidently some personnel facilities. The platforms have separating equipment to divide out the liquid oil droplets (called condensate) from the gas as produced, also a glycol dehydrator and metering equipment.

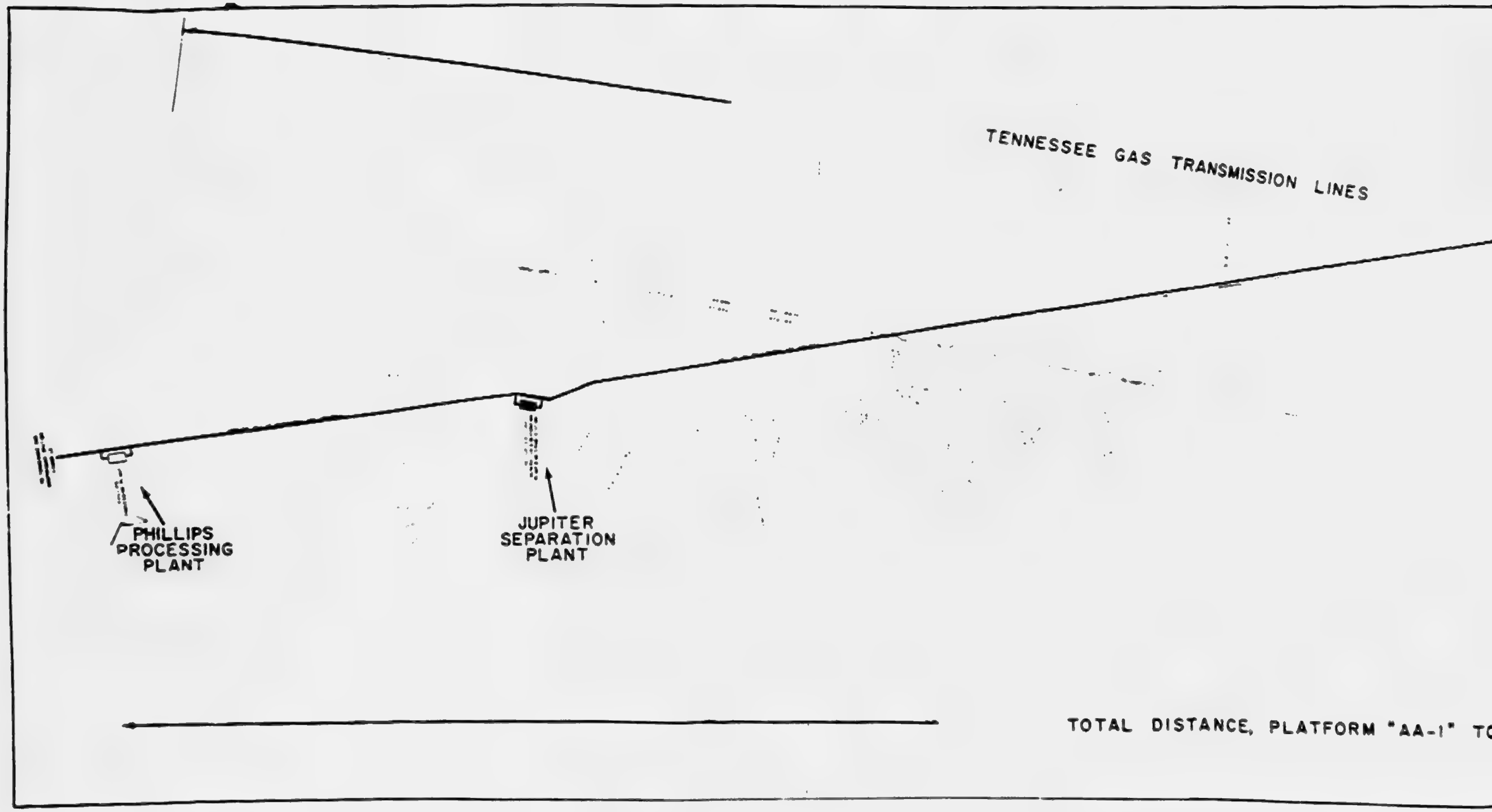
Jupiter has two short lines in the area, an 8,111-foot line connecting a Pure sub-platform with its platform A, and the other of 5,005 feet connecting the latter with K-M-P's platform A.

(b) *The lines to shore:* Jupiter's line No. 1 is 8⅝ inches by 8.44 miles, bringing gas to the Louisiana shore from Pure's platform A. Parallel to it (400 feet apart at first and ending practically together) is Jupiter's line No. 2, which is 10¾ inches by 9.55 miles from K-M-P's platform A to the shore point.

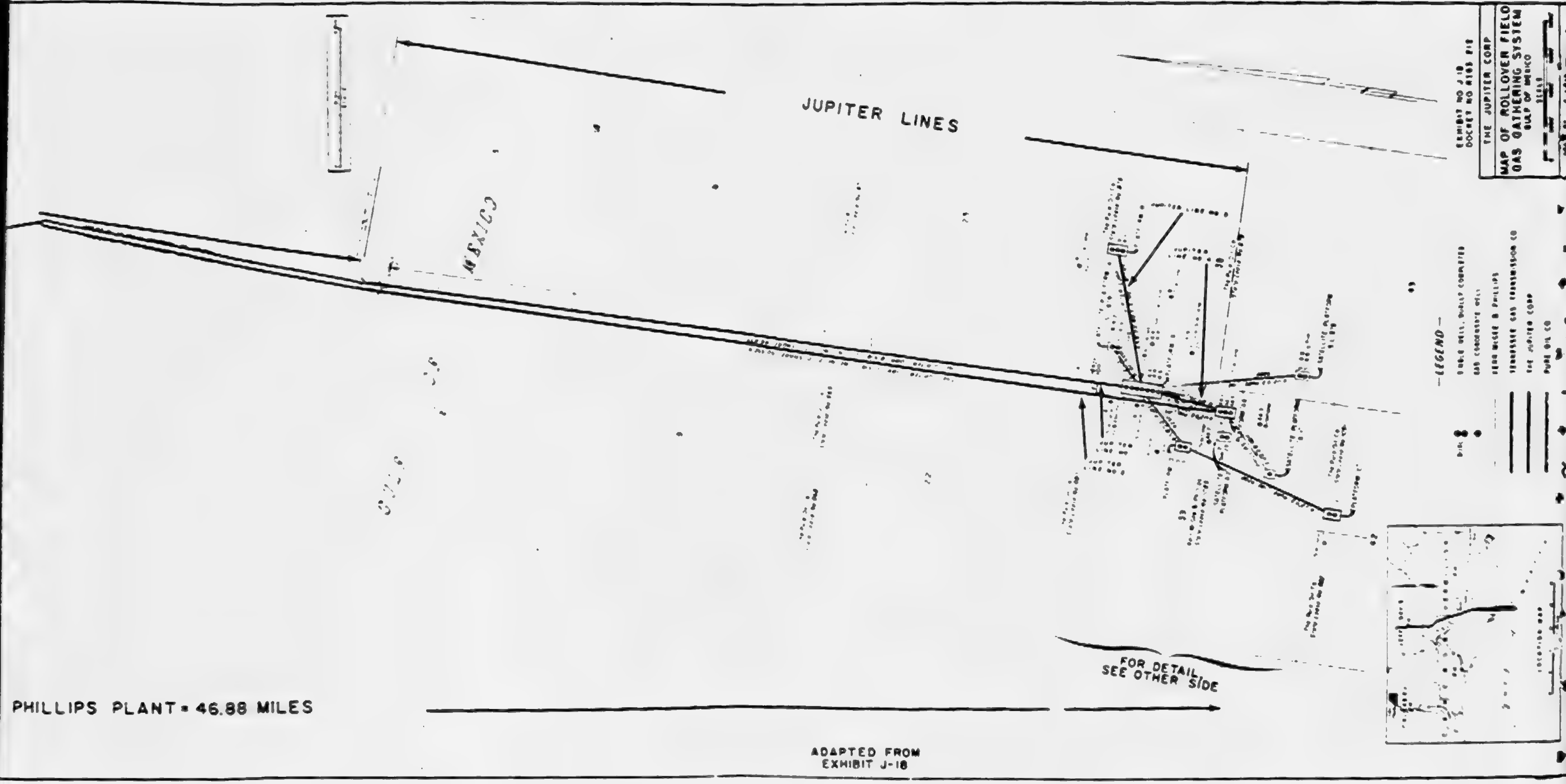


DETAIL OF
OFFSHORE PLATFORM
AND WELL FACILITIES

FROM STRIP MAP
EXHIBIT J-18



TENNESSEE GAS TRANSMISSION LINES
PHILLIPS PROCESSING PLANT
JUPITER SEPARATION PLANT
TOTAL DISTANCE, PLATFORM "AA-1" TO



THE JUPITER CORP
MAP OF ROLLOVER FIELD
GAS GATHERING SYSTEM
JUPITER LINES
MEXICO
—LEGEND—
FOR DETAIL
SEE OTHER SIDE
PHILLIPS PLANT = 46.88 MILES
ADAPTED FROM
EXHIBIT J-18

[3144]

(c) *The shore establishment:* About a thousand feet inland (in this bayou country the shore line is said to be highly indistinct), Jupiter's lines 1 and 2 join up through a common header with two lines owned by Tennessee but said to be operated in practical fact by Jupiter. Their lines are 16-inch and 8⅝-inch, and carry the gas for the next six and one-third miles, passing it into Tennessee's single 20-inch line which leads for 22⅓ miles onward to Jupiter's separation plant, beyond which Tennessee has an 8½-mile line to Phillips' Lake Arthur processing or gasoline plant. At this point, Tennessee's supply lateral connects, leading to a compressor station and Tennessee's lines to New York and the Northeast. Note there is no compression upstream from that point, the entire operation apparently being under well pressure.

(d) *The facilities in operation:* Except for the use of Jupiter's minor line connecting a sub-platform of Pure with Pure's main platform A, all the gas is brought by the two producers from the wells up to the respective platforms A. Here they—the producers—operate facilities which dry the gas when needed and separate out the liquid condensate in order to permit the measurement of each, after which the producers re-combine the gas and condensate into a commingled gaseous mass and turn it over to Jupiter.

In the case of K-M-P, title passes to Jupiter at that point, and their gas (with condensate) passes ashore in Jupiter's line No. 2. In Pure's case, the re-combined mass comes into Jupiter's custody at Pure's platform A, most of it proceeding ashore in Jupiter's line No. 1, but some (the overflow) transferring over to K-M-P's platform A through Jupiter's line No. 4, and there it joins with Jupiter's purchased gas and passes on to shore in Jupiter's line No. 2.

From the end of Jupiter's lines on shore, the combined stream flows in the Tennessee-owned lines to Jupiter's plant, where Jupiter separates out the condensate a second time and stores it for the producers. At the same plant, 29 miles from shore, the gas may or may not go through Jupiter's dehydrators, depending on conditions. At the outlet of this plant, the gas is turned over by Jupiter to Tennessee after it is tested and measured, and title there passes. Later on, in the Phillips' processing plant added in 1962, a true processing operation occurs, meaning that some of the hydrocarbons (propane) are removed and sold as liquids.

[3145]

Pure receives the producers' 30 percent share of the liquids from its gas, while Jupiter gets the same share (per its contract with the producers) from the K-M-P resale gas, amounting evidently to $82,200 in one year (Ex. S-2, Sch. 2, line 11). For reasons that are not developed or here understood, this revenue item of $82,200 is not deducted from the costs in the Staff's computation of a cost of service, with the result that Jupiter's cost-of-service revenues out of the entire operation will, in net effect, be supplemented by the additional revenues from the sale of the liquids out of the gas Jupiter buys from K-M-P. The amount of this increase in revenues which is not herein explained would appear to be the income item of $82,200 minus the associated expense items of $6,038 and $8,374 shown on Ex. S-2, Sch. 4, column 3. Neither Staff nor any intervener has proposed or recommended the reduction of Jupiter's cost of service by the amount of this related revenue item. This increment just about equals the return allowed in the cost of service.

Jupiter's claim: Referring to the specific claim with respect to the gathering exemption, Jupiter's position is that

interstate jurisdictional transmission begins only at the outlet of Jupiter's plant, where Tennessee takes title, and that all physical activities upstream of that point are exempt either as production or as gathering and therefore quite outside the coverage of the law (Brief, page 12). Of course, the sale by K-M-P to Jupiter (which Jupiter would have us regard as not a sale at all, see above) plainly is covered by the law in any event[7] and is not affected by the exemption once its contract status as a sale is accepted.

Jupiter's point, in support of the claim that gathering ends at their separator plant, results from their view that the word "gathering" in the law is supposed to refer to activities either (a) prior to the point where the gaseous stream is so processed and prepared as to be ready for interstate transmission, or else (b) prior to the point of sale to an interstate pipeline (Brief, page 7).

Taking the second point first, it obviously begs the question and proves nothing. If it be the decision here that Jupiter's service and activity between the platforms and its plant are really **[3146]** transportation of gas in interstate commerce, within the meaning and purpose of the law, as Staff contends, then Jupiter is itself an interstate pipeline by definition, and its activity after it takes delivery is not gathering, by their own definition number (b).

As to their first claim, notwithstanding the dozens, perhaps hundred or more of court and Commission decisions on the production and gathering exemption, Jupiter presents the novel thought that gathering means preparing the gas for interstate transmission.[8] Not a word of legis-

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[7] *Saturn Oil and Gas Company v. F.P.C.* (CA 10, 1957) 250 F. 2d 61.

[8] Nearly half the gas in this country never goes into interstate transmission at all, but is used in the state of production. Is Jupiter suggesting none of this is gathered?

lative purpose or correlation with the Congressional aim is cited in support. Instead, this new concept came from their witness, a petroleum engineering professor, who was obviously much more familiar with the oil business than with the numerous existing Gulf-to-shore establishments (3T554-561). He testified to the effect that his definition is the general business understanding of the term. On cross-examination, he felt compelled by his own logic even to apply it to two utter extremes — (a) if the gas were produced as a really dry gas, with no cleaning and separating necessary, then transmission would begin at the platforms (3T543), and (b) conceivably the gathering system could (but does not ordinarily) include as much as 300 miles of transmission to the possible location of a plant[9] (3T538 et seq.) Anyway, if preparing for transmission be the true test of gathering, nothing is shown here to refute the conclusion that the gas is fully ready for interstate transmission when it is separated and dehydrated the first time on the marine platforms (cf. 3T557). The re-mixing that occurs there after measurement is for the convenience and profit of the parties, to get the condensate to shore, and hardly changes the legal status of the gas.

[3147]

Quite apart from those logical infirmities, and from the complete dissociation between the definition so fashioned and any evident purpose of the law, the testimony became useless on the final remark that this industry-oriented definition or usage first manifested itself "in the early 'forties or late 'thirties" (3T577), which on its face disqualifies it as evidence of Congressional intent in the enactment of the Natural Gas Act of 1938.

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[9] It will be recalled this was Commissioner Buchanan's obection to the enthronement of the processor as an exempt gatherer, in his dissent in the original Phillips case, 10 FPC 246, 294, n. 11.

The phrase "production or gathering" evidently first appeared in a bill introduced on March 6, 1936 (H.R.11,622, 74th Congress), and in the resulting bill which was reported by the House Committee on May 13, 1936, H.R.12,680, and House Report No. 2,651. The committee report does not explain the phrase, but it is significant that the analysis of the jurisdiction section re-emphasizes the purpose to establish a supplement to state regulation and not to deprive the states of any lawful authority. This, of course, is the theme of the Committee's report on the bill finally enacted (House Report No. 709 of April 28, 1937, on H.R. 6586, 75th Congress), which, again, does not define the words "production or gathering" but does add the rather cryptic explanation of the entire exemption clause: "The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission . . ."

Staff applies FPC decisions: The Staff presentation is that gathering ends at the two main platforms A and transmission there begins. Since that is where Jupiter takes possession, its activity is transmission and therefore is subject to regulation. Their conclusion is, "If Jupiter is engaged in any gathering at all, it is completed at Pure's and Phillips-Kerr-McGee's platform A."[10] (Brief, page 19.)

For this, Staff quotes the leading case, Barnes Transportation Company (1957), 18 FPC 369, 372, whose language has often been cited and undertaken to be followed with its definition of "gathering" as **[3148]** "the collecting of gas from various wells and bringing it by separate and

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[10] It may be this concedes gathering status for the 15,000 Mcf moved up to Pure's platform A from their platform or subplatform B in Jupiter's mile and one half line No. 3 (see map). This would be relevant but hardly material.

several individual lines to a central point where it is delivered into a single line." The Commission adds that gathering ends at that point, also that transmission facilities subject to the law are those downstream from the point of "final commingling." For cases applying that rule, there are cited Texas Gas, 18 FPC 397; Medina, 30 FPC 227, and Ben Bolt, 26 FPC 825, affirmed, 323 F. 2d 610.

Conceding a certain amount of vagueness in the key terms, "central point" and "final commingling" (*cf.* 30 FPC 227 at page 233), it can hardly be denied that the two platforms "A" literally fit the definition. Both are "central" in the sense that well lines there converge (Exs. J-18 and S-4-A), both are the points of origin of Jupiter's two "single lines", and both are the points of "final commingling" so far as the two producers are concerned. The fact that various comminglings occur on down the line — either at the shore connection, or six miles inland, when for the first time all the gas gets into one pipe (Tennessee's), or at Jupiter's plant outlet — proves little or nothing because other commінglings occur still later on; indeed, so far as known, the literally "final" one does not happen until Tennessee's line crosses northwestern Pennsylvania. (30 FPC at page 245.)

Rather, as in Ben Bolt, Jupiter's lines are but an extension of Tennessee's supply lateral to take the gas gathered by the two producers, brought by them to their respective central points, and there commingled for transportation by Jupiter in interstate commerce, continuing the movement which does not cease until the gas reaches

the point of consumption in the far Northeastern states.[11]

[3149]

Jupiter relies on several early decisions of the Commission where gathering was discussed and more or less defined, but (a) the correlation of those cases with Jupiter's is not evident, (b) in none was it held that gathering means preparing pipeline quality gas ready for transmission and (c) all of them were pre-*Phillips* (1954), which makes them patently inapt to the present day and to the Commission's post-1954 program.

Far preferable to this verbalistic approach, the only rational search for the meaning of the word "gathering" is that which discerns and carries forward the legislative purpose, viz.:

(a) *The words of exemption:* The Court has often explained that the three words, "production or gathering" were meant to preserve to the states their responsibility to regulate those two activities.[12] That also is to be adduced from the Committee report cited. The states do not, of course, regulate gathering rates, but they do regulate well spacing, which (as suggested by Mr. Justice Douglas[13]) is evidently the state activity which was in mind. This only

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[11] Note the factual similarity to Tennessee's gathering and transmission system in the Bastian Bay, Louisiana field and that of its producer, Pan-American Petroleum. It is the conclusion of the initial decision that gathering has been accomplished at the central point in the field where all the gas going to the interstate lines has been assembled and commingled and that the lines extending from that point to the pipeline's platform are jurisdictional transportation functions. Tennessee Gas (1963), 30 FPC 1477, 1496. The resulting Commission Opinion No. 413 found it unnecessary at that time to pass upon the jurisdictional status of the facilities (page 1481).

[12] Interstate Natural, 331 U.S. 682, *et multi al.*

[13] Colorado Interstate, 324 U.S. 581, 603.

confirms the Staff's solution, which confines the gathering in this case to the well lines leading up to the platforms "A". At the same time, it adds no support for Jupiter's view that their "main" line is also gathering.

(b) *The total purpose:* Roughly once a year for the past 25 years, the Court has had occasion to enjoin upon the Commission, the profession, and the industry that the over-riding, all-important legislative purpose in the enactment of the law in 1938 was to provide a comprehensive system of regulation supplementing that of the states, that no element of the famed "Attleboro gap" was to survive, that "Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource."[14]

[3150]

Jupiter is rather put to it to assure the Commission that a decree in its favor will not create a gap of non-regulation, indeed, open such a gap 38 miles wide. In Chapter VII below, there is quite fully answered their point that the area rate case, AR61-2, should give the Commission all the controls it needs to keep this element of cost within bounds through its control over the price level that Tennessee pays. As shown below, the fact is that if area rate applies at the platform this intermediate cost of Jupiter's service becomes a direct cost payable dollar for dollar by the consumers, while if area rate comes to the sale on shore, this cost of bringing the gas in necessarily will be one of the costs affecting the area rate level and equally will be borne by the consumers. Anyway, as of right *now*, no more graphic evidence can be imagined than this very case of the effects of the gap here existing up to this date, namely

[14] The particular reference quoted is *FPC* v. *Transcontinental Gas Pipeline Corporation*, 365 U.S. 1, 28.

the charge that has been exacted for this 38 miles of transportation in an amount about five times more than the total cost of service.

Otherwise than as stated, the usual sources of legislative history offer little aid. It is surprising that, as often as the field of legislative history of the Gas Act has been tilled and plowed, its harvest remains meager and its yield lean. In *Phillips*, it is remarked, "The legislative history is not helpful." (347 U.S. 672, 688). Neither is it of aid for Jupiter to delve into the meaning of "gathering" in the oil taxation laws, where the legislative object is a quite different one; besides, the language they quote is so ambiguous as to fit most any solution here. Nor does it help to rely on the conclusions cited from *Ben Bolt*, 26 FPC 825, since the two organizations which were found or said to be gatherers in that case actually had applied here for certificates, and in issuing the certificates their prices were weighed and approved on the basis of their cost of service evidence; the statutory exemption was not the issue (see the initial decision therein, 26 FPC 825, 829).

It is concluded accordingly that the gathering in this case has ended by the time the gas reaches the platforms "A", where Jupiter's service begins, and that the statutory exemption of gathering does not avail to exempt Jupiter's service from regulation as transportation of gas in interstate commerce.

[3151]

VI

DOES COST UNIT FOR REGULATION INCLUDE PRODUCTION ACTIVITY IN OTHER AREAS?

The most profound of Jupiter's many defenses is the plea the Commission's order puts the wrong unit under

investigation. That is, the Company has a complete, separate division for its total oil and gas business, including some oil and gas production in Texas and elsewhere, and including its Rollover Field gas transportation function off the Louisiana shore. How and why, asks Jupiter, can the Commission select out and compartmentalize the one profitable portion of its gas business while ignoring the rest, where most of the profits have been invested (or consumed)? Their point is their gas and oil production enterprise loses much of what the transportation gains, and when the excess transportation revenues are balanced off, then only a fairly small and quite unexceptionable net return remains.

It is an inadequate answer that their figures do not separate out the jurisdictional, interstate gas production from other gas and from oil, since, if their theory is correct, the technical burden to initiate the inquiry on that basis is up to the Commission and its staff.

Before the current facts are reviewed, some history is needed. The transportation service, or purchase and resale, began as the sole enterprise of the original firm, Marine, in 1950. As profits accrued, the exploration activities began elsewhere. Five years later the merger with Commonwealth brought it into association with many more such programs. Jupiter, since taking over in 1962, has continued and increased them.

Their current program is in evidence. They hold oil and gas leases in ten states and in Haiti, and have an interest in 122 wells, operating half of them. Some small part of it is in various Louisiana parishes, none off-shore. Production for 1964 was 115,094 barrels and 1,318,046 Mcf (as present rates, the gas is worth somewhat less than the operating cost of service for the transportation

service as proposed herein). Some part of their gas goes interstate,[15] but no figures were given to show what proportion of gas, revenues, costs or return are from gas sold in interstate commerce (1T91 et seq., 3T481).

[3152]

Staff reported certain total figures for the "gas gathering, Oil and Gas Division" in S-3, showing oil and gas production revenues at $443,518, while direct production expenses came to $1,007,331 (apart from overhead allocations). After all deductions, current earnings remained of $362,189 for the entire division, including transportation. All of this from a total net plant capital account of $5.2 million, of which less than one million is in the Rollover transportation service (S-1, Sch. 6-A), which suggests perhaps 7 percent earnings.

It is evident what occurs — the earnings of the transportation function, $1.7 million in 1962, S-1, Sch. 1 — have been used roughly one-half to pay "dividends" to the preferred (see Chapter VII), and the rest has gone into the gas and oil exploration and production program, leaving only the small net revenue figure stated. *If* it should appear that a substantial part of the loss is in the search for, and development of, gas for interstate, jurisdictional sale, then, the claim is, the total jurisdictional function has no excess revenues and there is no occasion to question the transportation and sale rate schedules for Rollover Field.

Thus the question is what rate or rates are subject to investigation and determination in a single inquiry under Section 5. Turning to that section of the law, it says that, whenever the Commission finds "any rate, charge," etc. is unjust and unreasonable, the "Commission shall determ-

[15] Note this case is on their rate schedules numbered 7 and 8; the first six are not in evidence.

ine the just and reasonable rate . . ." As a corollary, Section 4 puts upon each natural gas company the requirement that "all rates and charges" shall be just and reasonable. Hence, so far as the statute is concerned, the Commission is doing just exactly what the law, in so many words, seems to contemplate, and the burden rather falls upon Jupiter to show there is something illegal about the staff's proposal based upon the Commission's order, or else that the inquiry into rate schedules 7 and 8 only is somehow so arbitrary as to offend basic standards.

Jupiter does make a plausible case to show that the inquiry into these two rates, ignoring the rest of their jurisdictional business, is at least unusual and will require some justification. Turning first to the few precedents there are on independent producers, Jupiter cites a number of cases to the effect that the costing unit to weigh and appraise in justification of a rate is the cost of the entire operation (citing *Hunt*, 28 FPC 623, and the *Sands* order of March 18, 1965, in RI64-356). Turning next to pipeline regulation (as a species of public utility transport control), there is cited a group of cases to the effect that the rate for a single narrow service, among many to which the utility enterprise is dedicated, is not to be justified by carving out and arbitrarily allocating costs, as distinguished from a system-wide determination. For this there are cited *Chicago Board of Trade v. U.S.* 223 F2d 348, 351; *American Louisiana Pipe Line Company*, 21 FPC 70, 101.

[3153]

The trouble is Jupiter does not fit neatly into either of the categories discussed. Jupiter does not operate like the several cross-country pipelines with investments in the hundreds of millions which have incidentally a minor production function contributing a small share to the pipeline

supply. In the typical pipeline case the production operations are "rolled in" with the much larger transportation functions in arriving at fair overall rates for transportation. Neither is Jupiter like Phillips or other very large independent producers having vast investments in wells scattered over quite an area, with complete gathering systems and, quite incidentally, a few thousand feet or few miles of transmission line either leading into their processing plants or connecting their plants with the main lines of their customers.

What is more, in the cases where all the production operations are rolled together for one rate justification, or where some incidental production is rolled in with the pipeline operations, it appears to be the premise that all are merely elements of one ultimate service to one customer or group of customers. Where the pipeline, for example, seeks new discoveries to add insurance to its own reserves, the objective is the same in the long run as that of an added investment in the pipeline itself, namely, the continued service of the customers who rely on that line.

What makes it clear that Jupiter's case does not fit any of the precedents in the entire lack of any indication that the customers served by Tennessee — who are called upon to contribute this three-quarter of a million dollars or so per year in a search for oil and gas — have any real interest in such a search or stand to benefit from it. There is no suggestion that Jupiter's gas in other areas, found or yet to be found, will be of benefit to *these* customers.

The second objection is the incongruous amount — the law says that all rates must be just and reasonable, yet the net effect of Jupiter's case is to justify a rate that is five times too high on the basis that a good part of the

profits is used to find gas for other customers (or conceivably for some of the same customers). A small margin of excess is frequently offset by averaging many rates and services, but here the margin on its face is too high.

Third, the usual reason for rejecting a study of a single pipeline rate, such as that for peaking service or winter service or the like, or some of those mentioned in the cases cited by Jupiter, is the extensive and uncertain accounting allocations required to carve out the cost attributable to a particular narrow operation out of many for which the same facilities are used. That point, too, does not apply here because the two sets of facilities are many miles apart and Jupiter already records the Rollover transportation costs quite separate from its production costs — they have to, because of the way the dividends (or really interest) on the preferred are geared to the net revenues of the **[3154]** transportation service, regardless of gains or losses elsewhere (see Chapter VII). Hence, these costs are kept separate, only very minor allocations are required, and there is no real accounting problem in arriving at true costs for the transportation service.

It is concluded, accordingly, that the patently unfair, unjust, and unreasonable rate for the transportation service can not be justified and made legal by offsetting the undercharges and losses incurred on other types of natural gas service located in areas far away and serving evidently quite different customers.

Note this is without reference to the results of the current area rate cases, like AR61-2 that Jupiter now wants to associate with. If it results that Jupiter's gas production in the other areas is all sold at the area rates, that would seem to moot the present claim that production and transportation must be rolled together.

Postscript

Some doubt remains about whether Jupiter should be called on for a better demonstration of the genuineness of the question it raises on this subject. Their witnesses kept talking about their exploration and production, and made many references to oil and gas, with no hint as to which made money and which lost money, and no hint as to how much of the gas production expenses and revenues pertain to jurisdictional service, i.e., gas destined interstate. It is assumed that Jupiter relies only on the jurisdictional business and surely does not justify a high gas transportation rate by its losses in oil or in intrastate gas. Pretermitting the technical question as to who has the burden of proof, since nothing was said or done here by Jupiter to show just how much of the excess revenues were offset by losses in interstate service, there cannot but remain a doubt whether such figures, if Jupiter chose to produce them, would show any substantial justification or offset.

[3155]

VII

COST AND REVENUES OF PIPELINE ACTIVITY, AND ALLOWABLE RETURN

Having concluded that the cost unit for regulation is the Rollover Field transportation and resale activity, excluding Jupiter's oil and gas production in other areas, it remains only to determine what the appropriate pricing basis should be, in all the circumstances, including a fair rate of return, and to apportion that cost between the transportation activity for Pure and the resale activity on the K-M-P gas.

Staff's exhibit, S-1, has constructed a "cost of service" applicable to the transportation activity and the resale of the K-M-P gas, with allowances for all direct expenses, appropriate allocations for the indirect, a depreciation expense allowance for the test year (1962) on a plant service life basis (as taken directly from the corporate books), tax allowances, and a return at 6.5 percent of the Staff's newly-constructed rate base. The result of the Staff's exhibit is to call for an annual cost of service allowance of \$274,259 (aside from the cost of purchased gas), and the point therein which is of prime significance is the contrast between that figure and the actual revenue for the year 1962 of \$1,944,697. Thus, to give effect to the recommended rate will reduce the return from \$1,618,281 to \$43,899. On this, Jupiter does not find itself in agreement.

As to the raw figures used there is no particular controversy; they are taken from the corporate books and were agreed to. That is, the correctness of the figures — apart from whatever they may stand for — was stipulated at the hearing. 1T248, 1T264.

Is Jupiter a private contractor? First off, Jupiter generalizes that the Staff has put it in the wrong field entirely, that Jupiter is not a "traditional pipeline engaging in a public utility transportation service" (what tradition is referred to is not clear), that Jupiter is merely a delivery agent for the producers, that Jupiter's cost of service and rate of return are irrelevant, and its contracts with the producers may be modified by the Commission only upon a showing that the producers for whom they act have found their agreed prices to be confiscatory and so burdensome as to force the producers out of business.

The view is earnestly expressed but ignores the law of the land. Whether it is a public utility or not, Jupiter is

unquestionably a "natural gas company" within the definition of the Natural Gas Act; Jupiter is found above to be in the business of transportation of [3156] natural gas in interstate commerce, for the account of Pure and within the purview of Section 1(b) of the law; and Jupiter's sale to Tennessee is unquestionably a sale of natural gas for resale in interstate commerce, which the law directly applies to — the very point of *Phillips* — and as such, by the words of Section 4 of the Natural Gas Act, its rates for such transportation and sale must be just and reasonable to be lawful.

In the light of the wide disparity between the revenues resulting from the present rates and the costs attributable to the service, the present rates are patently unlawful on their face because so obviously unjust and unreasonable, and it remains for the Commission under Section 5 of the Act to determine the rate to be thereafter observed and enforced. There is simply no statutory or other basis for the asserted claim that the rate becomes unjust, unreasonable and unlawful only when it is so high as to force the customer into bankruptcy. Jupiter's arrangements with the producers[16] and with the pipeline are indeed private contracts, as they say, but as mere pieces of paper called contracts, they derive their only force from such

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[16] Jupiter strains at the leash to show it is not a seller to Tennessee of the gas it buys from K-N-P; that, in view of the peculiar pricing relationship, it is really an agent of K-M-P for the transportation of gas to Tennessee. The agency relationship is roundly denied and denounced by Phillips, the very principal they seek to be related to as agent; but anyway the point is irrelevant since, as shown above, Jupiter's transportation service from the central point in the Gulf to the shore connection with Tennessee constitutes transporttaion in interest commerce quite as much covered by the law as its resale activity to Tennessee. Jupiter's related argument that its transportation service for Pure cannot be included in the chain of costs to be borne by the public consumers is considered in Chapter IX below.

sanctity as the law gives to them; and the applicable law, here the Natural Gas Act, brands them illegal (as to their rates) and requires them to be modified accordingly.

[3157]

Jupiter misconceives *Sierra*, 350 U.S. 348, in claiming that Pure's solvency or ability to pay is relevant to the Commission's action on Jupiter's contract with Pure. That puts the shoe on the wrong foot; under Sierra, it is the possibility of Jupiter's insolvency, not Pure's, which could conceivably be of concern to the Commission under Section 5. There is, to be sure, a repetition of claims in Jupiter's brief that this order will be drastic in its effect on Jupiter, indeed disastrous; but, since the rate provides for a reasonable return for the only activity it regulates, it is plain that the dire conditions apprehended would only be the result of Jupiter's continued investing its revenues in oil and gas exploration in other areas at a considerable loss. If the results continue to be drastic, it is not due to the jurisdictional transportation activity.

Test year (1962): Jupiter makes quite a plea that cost figures based on the year 1962 are quite out of date, unrepresentative, and unsuited for a current rate order. First off, this plea comes with small grace from the side which has caused so much delay in this proceeding — the case began three years ago; but many months elapsed in the Staff's unsuccessful efforts to get access to the corporate records, after which the task must have been very considerable to sort out the company's gas transportation and sale function from its diverse other activities involving oil and gas production, bakeries, trucking, plumbing, real estate, etc. Thereafter, following the final conferences with the Staff, some months elapsed for Jupiter and Tennessee to prepare their alternate proposal to lease the facilities to

Tennessee. Finally, in December, 1964, the Staff's testimony and exhibits were served. Four months later the pre-trial conferences convened, and even then Jupiter announced it had not yet been able to study the evidence enough to determine which witnesses would or would not be needed for cross-examination (1T192). At the same time, its own evidence served out of time was admitted over objection, and Jupiter's request for a three-week delay in beginning the hearing was granted. In the meantime Jupiter had filed 13 to 14 separate pleadings with the Commission, including about six motions for continuance, and had also filed injunction suits in two United States District Courts. Without advertising to the motivation for the delaying tactics, it is enough that the delaying party cannot be heard to complain of the staleness in the test year figures, if any there be, which has resulted from the delays.

Secondly, Jupiter had every opportunity in rebuttal to furnish the figures from a later and better test year; but, apart from the question of volume of deliveries, such important data as there is in the record pertaining to later years would suggest a lower rate, not a higher, that is the evidence of possibly lower expenses and of evidently a lower rate base.

[3158]

One item, pertaining to volumes delivered, is reserved in the above. Note, from Exhibit S-1, the Staff's recommended solution is to divide the dollar figure of its cost of service for 1962 by the Mcf volumes delivered that year, which produces its suggested rate of .518 cents per Mcf. But the volume figure varies from year to year, while the expenses are fairly constant. In round figures, the Staff used 53 million Mcf for 1962 to arrive at its recommended rate of

.518 cents. For 1958, the volume was 46 million, for 1959 it was 49.4 million, and for 1960, 55.5 million (Exhibit J-11). But for 1963, the volume figure was 47 million Mcf, down 11 percent from the year before (7T1076). On the other hand, the expenses are steady — they do not vary "significantly at all" according to the volume of gas passing through the pipes (6T889).

The result is plainly to suggest that the final net rate to be prescribed should be in terms of a flat number of dollars per year or per month, or merely a dollar ceiling on the monthly invoices equal to one-twelfth of the annual cost of service. There was evidence that the operating expenses are expected to be fairly constant through 1976, but that volumes are expected to decline beginning in 1970 (6T999-1000). With expenses (excluding purchased gas) remaining steady, there is no reason to inflate or diminish the return based on the variance in the volumes, and the order here subjoined so provides.[17] With this element provided for, no substantial objection or question remains with respect to the 1962 test year.

Rate of return: The Staff's recommended rate of .518 cents is based upon a rate of return of 6.5 percent, which the Staff witness repeatedly called "illustrative only." The Staff undertook a financial analysis of the company as a basis for recommending a rate of return, but because of the intricacies of its capital structure the Staff witness found himself unable to determine the "cost of money" for Jupiter and therefore felt not in a position to recommend definitively a rate of return (1T48, 3T486).

[17] Otherwise, as suggested at the hearing (6T898), it is evident that it could be some time yet before the attached order becomes effective, in which event it might not be inappropriate to reconsider the single question or rate level on the basis of figures then more current.

[3159]

The background is this. The original investor was Marine Gathering Company, formed specifically for the Rollover Field project. By 1955, Marine's assets were transferred to Commonwealth Oil Company, with an exchange of stock (4T693). Commonwealth was an oil exploration company with interests in Florida and elsewhere. Seven years later Commonwealth merged with Jupiter Corporation, which again involved a stock exchange. But the former owners of Commonwealth received a new preferred stock issue of Jupiter, the surviving corporation, with a very special, cumulative dividend arrangement to the effect that dividends up to a dollar and a half per year per share would accrue and be paid if, as and when the Rollover Field gas transportation activity earned that amount; and this dividend is payable regardless of the earnings or losses of the company generally, and regardless of Jupiter's oil and gas production elsewhere. At the same time, there was fixed a redemption value on the preferred at $26.50 per share (or $25 on liquidation), which is said to be payable ahead of any contractual indebtedness of Jupiter (Exhibit S-5, Schedule 5-6). The preferred is convertible to common, but on a declining basis.

The result is that the 559,899 preferred shares (held by the former Commonwealth owners) have a dividend claim at $1.50 to the first $800 thousand plus of annual earnings of the Rollover Field gas transportation operation; and, on liquidation, they have an apparent priority over any creditors or claimants to the first $14 million of assets (Ex. S-5, Schs. 3-4-5); what is more, no new credit obligations may be assumed by Jupiter except those agreed to be junior and subordinated to the prior right of the preferred to the "gas gathering" revenues and assets on liquidation (*id.*). With these figures, contrast the Staff's

proposed allowance of less than $43 thousand in annual return (or five percent of the above annual dividend requirement), based on property whose actual original cost was $1.59 million (or 11 percent of the above liquidation liability). Whether this complex arrangement was dictated to segregate the Rollover Field gas transportation and resale operations from the rest of Jupiter's many activities, it is evident that the preferred stands more nearly in the relation of a purchase money mortgage, with the same priority to the transportation revenues that would attach to a revenue bond.

Actually, the gas business is the smallest of Jupiter's six separate and diverse operating departments, the corporation is otherwise a substantial concern showing assets of $39 million and a net worth of $9 million (S-1, Sch. 7). Its long-term debt of $14 million is carried at an average interest rate of 6.2 percent (S-1, Sch. 4).

[3160]

In the light of this peculiar and unusual "stockholder" relationship, the Staff found it impossible to compute the cost of capital for Jupiter or to derive a rate of return to be recommended on the basis of the cost of capital (1T51). Instead, a cost of service was prepared upon the "illustrative" 6.5 percent rate of return on the basis that figure represents the highest rate allowance the Commission has made for pipeline operations (1T22).

On some obscure basis, Jupiter objects that the Commission may not conclude upon its own determination and judgment what the appropriate rate of return should be, unless some witness at the hearing has espoused the rate to be selected so that it could be cross-examined. No such rule is known (*see, e.g.*, 17 FPC 685, 703); the authorities relied on refer to evidentiary findings of basic data, con-

crete facts, and records of past events which are used to form the basis of a judgment figure such as rate of return, certainly not to the judgment end-process itself. If, as in the recent case of *Central Illinois Public Service Company v. F.P.C.*, (CA 7, 1964) 338 F. 2d 682, the Commission may form its own judgment and determination on the engineering capacity of a gas line from the facts in the record, it can equally produce its own judgment figure for the rate of return — after all, that is perhaps the ultimate purpose for which it was established in the first place as a specialized, expert commission. *Cf.*, e.g., its opinion in *Hunt*, 27 FPC 624, 665.

Next, Jupiter objects there must be some correlation of its return with that of other enterprises with similar risks, citing such classic cases as *Bluefield Water Works v. P.S.C.*, 262 U.S. 679, 692. But they rely on the wrong risk. The cases do not contemplate rating of physical hazards, marine dangers, hurricanes and acts of God — real and serious as those may be for off-shore pipe line operation. These costs can always be insured against and or recompensed, under the Commission's standard accounting system, and amortized in the rates. What the cases do stand for is spelled out in a work under the authorship of Jupiter's witness, Dr. Paul J. Garfield (and W. F. Lovejoy), "Public Utility Economics" (1964), at page 121:

> "The term 'risk' is subject to several different interpretations. Technically, there is a difference between 'risk' and 'uncertainty,' as pointed out by Professor Knight. Risk is suspectible to measurement and thus to predictability within the limits of probability analysis. Risks such as death, fire, [3161] illness, and so forth are readily insured against when large numbers are used. Uncertainty is not susceptible of measurement and thus cannot be predicted and insured against. It is uncertainty, in this sense, which is the basis for

> competitive profits. We bow to usage, however, and substitute the word *risk* for *unceraintų*. Risk in most public utility economics is of the 'non-quantitative' type. See Frank H. Knight, *Risk, Uncertainty and Profit* (Boston: Houghton Mifflin Company, 1921), pp. 19 ff and Chapter VII."

In dozens, perhaps many more, examples too numerous to require citation,[18] the Commission has allowed pipe lines from 6.0 to 6.5 percent, none apparently over the latter figure. As spelled out in the case of Hope, 320 U.S. 591, the economic risk is so much the less where the markets are established and the revenues quite secure. Jupiter's long-term contracts, assured market, and substantial supply reserve assure that its economic risk is at least fairly comparable to that of pipe lines generally. The allowance of the same return assures a close relation to the earnings of these comparable enterprises. At the same time, in view of the peculiar preferred stock arrangement just discussed, there seems to be no opportunity for any return on the common equity segment of the capital. Normally, for pipelines this return is about 10 percent — for a list of examples, see 28 FPC 482). A higher rate (than 6.5 percent) might have been allowable, had this case come along in 1950 when off-shore transportation was new and untried, experimental and obviously risky in the economic sense. Jupiter could have then claimed with reason a most unusual allowance for its ingenuity and resourcefulness. But that allowance by 1965 has long since been collected, see the figures above, and with the period of research and development, so to speak, long since past and well compensated, no reason remains for a future return allowance any different from that of other pipe lines.

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[18] See Leventhal, "Rate of Return — Comparable Earnings Standard" (1965) 74 Y.L.J. 989.

[3162]

Adjustment of rate base to normalized depreciation: One adjustment to the Staff's determination pointed out in Jupiter's brief, appears justified and required, and its net result is to increase the allowable rate from .518 cents/Mcf to a higher figure of .632 cents/Mcf. This comes about from an increase in the rate base, and consequent return, after constructing a new and normal depreciation requirement for the properties was developed. The background is this:

The first pipeline was laid in 1950, and practically all the investment was installed and put in service by 1953. Not feeling called upon to keep its records or justify its rates on a public utility basis, Jupiter and its predecessors elected to record pipeline depreciation by the several accelerated-rate methods permitted for tax purposes by the Internal Revenue Code. By the time of the test year used by the Staff, 1962, this depreciation policy resulted in a very large accrued reserve, about 58 per cent, and correspondingly over-reduced the net plant balance from $1,598,886 to $675,376, the figure used by the Staff as the rate base in computing its 6.5 percent return.

That is to say, the Staff's net rate base figure is $675,376, which is comprised of gross plant totalling $1,598,886 (original cost of pipeline and separation plant facilities), less book depreciation of $929,378, to which was added $10,868 of allocated general plant facilities. Exhibit S-1, Sch. 6-A.

The original actual cost figure of $1,598,886 used by the Staff is that remaining after eliminating a "write-up" of the plant account in the amount of $798,220. For consistency, the Staff also reduced the recorded depreciation in the same proportion (1T29). As to the several different write-ups claimed, surely no answer is really needed to Jupiter's plea (Brief, page 62) that various acquisition adjustments and

contract evaluations which inflated its plant account several times over its true original cost, should now be reckoned as part of its rate base. It is the view that the industry has long since outgrown that sort of approach; indeed, that it leads to the very antithesis of the law's standard, "just and reasonable" rates.

The accelerated rates of depreciation used by the company to compute its income tax presumably was and is correct for that one purpose. However, the realities of regulating rates require a representative rate base which in turn is based on a normal reserve requirement. For most pipelines before this Commission this requirement has reflected straight line depreciation related to the service life of the property. This results in a fair [3163] allowance of return, and a consequently just and reasonable rate. The tax depreciation is simply the law's method of figuring the income tax, and its only reality is an indirect method of reducing the taxes payable in the early years of the property. It does not mean the useful life of the pipelines is any the less, and without some such relationship it has little relevance to ratemaking.

This oversized reserve was not lost on the Staff's witness; however, he announced himself "estopped" from using a normal rate base valuation. He viewed the entire book reserve as already collected from the "ratepayer" (actually mostly from Pure, the larger producer) and indicated that to construct a new and realistic depreciation reserve would be tantamount to writing up the rate base and permitting a second recoupment from the ratepayer of the same plant (2T372).

By whom or by what the witness was estopped he did not say; but as a precedent for a substantial write-down in the reserve and for normalizing upwardly the rate base, there

is referred to a case known as *City of Cleveland v. Hope Natural Gas Company* (1942), 3 FPC 150, 167, 203, affirmed, *sub nom. FPC v. Hope Natural Gas Company* (1944), 320 U.S. 591. Hope had accumulated an excess book reserve and the Commission concluded that "where a large part of the company's business is brought under regulation for the first time and where incorrect depreciation and depletion practices have prevailed, the best procedure is to deduct the reserve requirement in computing the rate base." Accordingly, the Commission constructed the proper reserve requirement, based on straight line service lives of the properties, and reduced the book depreciation reserve from $39,000,000 to $22,000,000. This resulted in increasing the rate base by a corresponding amount, up to nearly $30,000,000. It was the dissenting Commissioner who, like the witness here, pointed out that excessive depreciation charges had already been collected from the customers and should, in his view, not form a part of the rate base (page 193). But the Commission, since it was prescribing rates for the future, accepted the reserve study presented by the Staff, which had the effect of marking down the depreciation reserve and raising the base to the level called for by normal depreciation requirements.

[3164]

The Staff's point that establishing a normal rate base would permit a second recoupment proves entirely too much. The fact is Jupiter had a 1962 net revenue from its Rollover Field transportation operation of nearly $2,000,000,[19] and since its business has been steady and its net transportation rate margin unchanged, the company, or at least its preferred stockholders, has collected back

[19] $1,944,697 computed from Exhibits S-1, Schedule 1; S-2, Schedules 1-2.

over the years prior to regulation many times more than the original invested cost (just as the stockholders in *Hope* had been collecting an excessive return during its unregulated years). If Staff's theory is that the new rate now to be fixed must not allow a second (or tenth or fifteenth) recoupment, then no return can be allowed at all![20]

Bearing in mind that a rate order under Section 5 of the Natural Gas Act is to fix the rate for the future and not to incorporate a reparation for the past, and in view of the special circumstances discussed in the "rate of return" section above, it is concluded that the new rate to be, as the law says, "thereafter observed and in force" must be that resulting from a currently depreciated property valuation, quite unaffected by excessive rates of the past and equally unaffected by the accelerated depreciation used in figuring taxes. Both abnormalities are irrelevant to the future and to what is a just and reasonable rate for the future.

A revised computation for this purpose is set forth in the appendix and results in a normalized depreciation reserve of $431,624, and a rate base of $1,173,130 (the balance of the actual investment). After corresponding adjustments of income tax on the return, the new cost of service for the Rollover transportation function becomes $334,859. If this figure is applied to the 1962 volumes, the unit rate per Mfc would be .632 cents, or 20 per cent more than the Staff's .518 cents.

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Note this is not computed on the customary predicted straight-line useful life basis because it would be difficult to ascribe a useful life for this submarine line and there

[20] *Hope* had already earned back its total investment "nearly seven times." (320 U.S. at 604).

is no evidence on it. It seems more realistic to use the exhaustion of the gas reserves as a guide. On this question, a study as of only one month before the test year revealed that 27.08 percent of the original reserves had been withdrawn and 72.92 percent remained (6T999). Since — barring the possible chance of new discoveries — it is the total depletion of the field that will mark the certain end of the useful life of the lines, it is that proportion that has been used to normalize depreciation and arrive at a reserve requirement.

It is somewhat a coincidence that the actual dollar figure of reserve requirement is very close to what would result from the useful life basis at the customary 3 to 3.5 percent per year rate. It is indicated for this case to be $431.624, while that on a 33-year service life basis, or at the rate of 3.03 per cent per year, would be $434,696; while if based on 3½ percent a year (which the Staff said is normal) would be $502,074. By way of further reference, the Commission's "FPC S-159, Depreciation Practices of Natural Gas Companies, 1961," reports that 31 pipeline companies had an accumulated provision for depreciation of 26.2 percent of their gas plant investment, which was being accumulated at the annual rate of 3.4 percent.

Conclusion: It is concluded, accordingly, that the proper unit for regulation of Jupiter's enterprise (excluding its gas production in Texas and other states which will be subject to area rate control) is its entire transportation and resale operation from the Rollover Field offshore Louisiana; that the rate base attributable to that operation is, for the reason stated, in the net amount of $1,173,130; that no recognition can be given to various write-ups, contract valuations, acquisition costs or other intangible valuations in excess of the net depreciated original investment; that the rate of return to be hereafter allowed should be com-

puted at $6\frac{1}{2}$ percent (as in the case of other pipelines); and that the resulting cost of service allowable, not inclusive of the cost of purchase gas, is $334,859. The specific application of that cost of service (which includes the return so computed) to the resale of the K-M-P gas and to the transportation of Pure's gas is the subject of the following two chapters.

Postscript: On the general approach to the rate level, Jupiter's witness Garfield presented an extensive study (J-17) of the prices paid in quite a number of other cases for this intermediate service between the gathering point and the pipeline, many of them collecting several cents per Mcf, all for the purpose of showing Jupiter's rates are reasonable. The opposition counters that the small volumes of **[3166]** gas in those cases account for the high rate, and offers other examples where the price is only a fraction of a cent. The answer to these contentions is none of those was a rate case, in none has the rate been examined and found just and reasonable (5T811, 822), which makes them unacceptable here. (*PSC of New York* v. *F.P.C.*, (CADC 1960), 287 F. 2d 146). About all they prove is that many more rate inquiries, such as here, are indicated.

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VIII

APPLICATION OF COST OF SERVICE TO RESALE OF K-M-P GAS

It appears to be unquestioned that Jupiter's resale to Tennessee at the outlet of the Jupiter plant, 29 miles on shore and nearly 40 miles from the point where Jupiter receives the gas, in a jurisdictional sale such as the law describes, namely, a sale of natural gas in interstate commerce for resale, as soon, at least, as it is agreed that Jupi-

ters' tortured attempt to reform the sale into an agency relationship is denied, for the reasons stated in Chapter IV. Secondly, as a jurisdictional resale, it is irrelevant whether any of Jupiter's prior service up the line might constitute "gathering" exempt from the law,[21] although, as stated in Chapter V, no such view is here agreed to. In Chatper VI it is concluded that the cost unit for regulation of Jupiter is its total Rollover Field activity, namely the transportation for Pure and the resale of the K-M-P gas, while in Chapter VII it is concluded that the cost of service, including return, attributable to both activities is $334,859 in addition to the cost of purchased gas from K-M-P. Of the total volume for the test year, 1962, 38.48 percent is that derived from K-M-P by purchase and resold to Tennessee (Ex. S-2, Sch. 2). Hence the proportion of the cost of service applicable to the K-M-P resale arrangement comes to $128,854, based on that ratio of volumes. It remains, therefore, only to fashion an order which will have the result of reducing Jupiters' sale price to Tennessee to that amount.

It is claimed that to do so will bring on many complications, mostly resulting from the rate provisions in Jupiter's purchase contract with Kerr-McGee and Phillips, which technically are not in this case or subject to its sanction. The point is derived from the identical pricing provision contained in Kerr-McGee's Rate Schedule No. 56, for its sale to Jupiter, and Phillips Rate Schedule No. 329, for its sale to Jupiter. In each, the price to be paid by Marine-Commonwealth-Jupiter to the two producers is the "price per Mcf provided to be paid during the same period" by Jupiter's buyer (formerly Niagara Gas and now Tennessee) *minus* what is evidently the agreed charge for Jupiter's service in terms of a variable [3168] number of cents

[21] *Medina Gathering Company*, 30 FPC 227.

according to the average daily quantity each month, which works out, at current averages, to 2.4 cents per Mcf. Thus, as Jupiter points out, when they first started to sell to Niagara at 16.4 cents in 1953, Jupiter (then Marine) paid K-M-P 16.4 cents minus 2.4, or 14 cents. Five years later, the price to Niagara and later Tennessee went up to 21.3333 cents and Commonwealth-Jupiter continued to receive 2.4 cents, paying the balance, or 18.9333 cents, to the producers.

The case was tried on the presentation that, as a result, any reduction by the Commission in this case in Jupiter's price to Tennessee would, because of the contract provision just cited, have no effect at all on Jupiter and would merely operate to reduce Jupiter's payment for its gas purchase by the same amount. This evidently moves the Staff to its view (Brief, page 37) that a reduction in the 2.4-cent charge would effect an increase in K-M-P's charges to Jupiter but this the Staff counters by its concluding recommendation or recommended finding that the reduction of the 2.4-cent per Mcf charge under Jupiter's FPC Rate Schedule No. 8 (its sale to Tennessee) "results in a reduction in Tennessee's purchase gas costs." This is based on the Staff witness' testimony recommending that the Commission's order shall revise Jupiter's Rate Schedule No. 8 on its sale to Tennessee to call for a price consisting of (a) Jupiter's lawful and required cost price as otherwise approved by the Commission with respect to the cited rate schedules of Kerr-McGee and Phillips, plus (b) the sum of .518 cents per Mcf.

That solution has the benefit of precedent, see the Medina Gathering Company case cited above. It also meets the approval of Kerr-McGee and Phillips, whose brief says: "The Commission may take the approach of directing Jupiter to collect from Tennessee an amount representing the just and reasonable rate for its services, in excess of the

rate that the Commission sets for Phillips-Kerr-McGee . . ."[22]

The confusion caused by the understanding of Jupiter's purchase contracts, as above outlined, has resulted in frantic arguments notable mostly for the extremity of the positions. Jupiter apprehends the net effect of the Staff recommendation would be to increase K-M-P's net revenue, quoting the Staff brief at page 37, from which follows a **[3169]** series of legalisms to the effect that this is beyond the Commission's power. On the other hand, Kerr-McGee and Phillips appear to apprehend that the effect of the recommendation would be to decrease their revenues, and their brief is devoted mostly to a frenetic presentation to the effect that their rate schedules are not before the forum and, whatever else occurs, nothing must happen to disturb their arrangement or reduce their sale price.

The trouble with all of these complications and confutations is that they overlook another and equally important section of the producers' rate schedules under which they sell to Jupiter, both of which are in this record as items by reference. Aside from the provision mentioned, which by itself would seem to reduce the sales price whenever Jupiters' resale price reduces, Supplement No. 2 is also a part of each rate schedule, consisting of a supplementary agreement of March 18, 1953, which was filed to become effective November 5, 1958. Referring to the price provision quoted above, the supplement in each case reads:

> ". . . If at any time and for any reason Marine (now Jupiter) is required to reduce the amount per Mcf specified under said item (iii) as the adjustment to be made to the applicable price [that is the credit as explained above, resulting in a 2.4-cent charge by Jupi-

[22] The Staff testimony is at 1T44 and 2T424. The K-M-P statement is from their brief at page 8.

> ter] . . . then the price payable to Phililips and Kerr-McGee under said subsection (b) shall not thereby be reduced, but shall be increased by an amount per Mcf equivalent to the amount per Mcf by which such amount specified in said item (iii) or receivable by Marine is reduced, to the end that Phillips and Kerr-McGee will receive for gas delivered under said contract the applicable price per Mcf less only the amount per Mcf to which said amount specified under said item (iii) is reduced or the amount per Mcf actually received by Marine for gathering of such gas and condensate."

The result of all this contractual shuttlecock would seem to be that the two adjustments cancel out, that is, that under the first clause, Jupiter's purchase price goes down by the amount of the reduction in Jupiter's sale price, but under the second clause Jupiter's purchase price goes up by the amount of the reduction in Jupiter's net margin. With those amounts the same, it results that the producer's sale price remains unaffected by this order and by the reduction in Jupiter's sale price to Tennessee.

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Of course, the hyper-technicality can be asserted that the second adjustment is not available to this case because it applies a provision of Jupiter's contracts with its producers, which were not the announced subject of today's investigation. The answer is more clear than the question — the order herewith is directed at the rate which is before the forum, namely Jupiter's Rate Schedule No. 8, and the direct incidence is only upon that sale rate. It is quite true that this order, in its present compass, cannot require a change in the two producers' rate schedules, but the answer is there is no present need to do so, nor occasion for it, and it is specifically found that the intended purpose and effect of this order is not to affect the rate level under those schedules.

Notwithstanding Kerr-McGee-Phillips' fervent plea that nothing be allowed to happen here that affects them, it is not clear how the Commission could go further than this in the present matter — the producers are sanguine indeed in asking that the Commission's order allay the possibility of vexatious litigation concerning its possible effect on their contract to Jupiter. It is, after all, not the order itself which even suggests any change in the producers' sale price to Jupiter; if that suggestion arises, the result comes instead from the two provisions of the contracts which the producers themselves signed and which seem more or less to relate their sales price to Jupiter's sale price and net revenue, both of which are very much the Commission's responsibility.

Certification status: After this record closed, the certification status on Jupiter's purchase and on its sale underwent a certain change, but in a case not here consolidated. On August 11, 1965, there issued the Commission's Opinion No. 470, in Phillips Petroleum Company, G-16,611 *et al.*, which took the following actions:

(a) issued a permanent certificate to Phillips and Kerr-McGee for their sale to Jupiter;

(b) limited the initial price in that sale to 18.5 cents per Mcf effective July 23, 1964 (the previous price was, as stated, 21.3333 minus an average of 2.4, or 18.9333 cents);

(c) deferred decision on Jupiter's application for a certificate for its resale to Tennessee of the gas purchased from K-M-P; and

(d) conditioned the temporary certificate issued in 1962 for Jupiter's sale to Tennessee to require that "as of July 23, 1964, the price provided in the rate schedules covering

(3170)

the sale to TGT of the gas obtained from Phillips and Kerr-McGee shall not exceed 20.9 cents per Mcf."

Whether in fact the adjustments and refunds called for by that decision have since August been made, this record is not aware.

[3171]

Application of cost of service: In Chapter VII above it is developed that the allowable cost of service for Jupiter's two services is $334,859 per year plus, of course, the cost of purchased gas. Applying the relative volumes for the test year, 1962, as shown in Staff's Exhibit S-2, Schedule 2, lines 14 and 22, the proportion applicable to the K-M-P resale arrangement is $128,854.

The Staff proposal is to follow the customary route and compute a rate per Mcf, dividing the total cost of service by the number of Mcf carried and sold during the year. As stated, this has the effect of reducing Jupiter's return as the volume goes down when in fact the expenses are expected to remain relatively constant. Indeed, the parties themselves have proposed a flat rate in their certification application. Accordingly, in order to insure against unjustified changes in the return due to changes in the volume either way, the order here subjoined directs the revision of Jupiter's FPC Rate Schedule No. 8 to limit each monthly charge, otherwise at the contract rate, to the sum of (a) the cost incurred for purchased gas during the same month at the rate lawfully in effect for Kerr-McGee and Phillips, and (b) one-twelfth of $128,854, or $10,737.83, except that the invoice for December of each year may make up any deficiency for that year.

Postscript: K-M-P's brief complains with heat that the examiner denied their right to file a rebuttal case, citing constitutional authorities. Some rebuttal, on useful issues,

was in fact admitted (7T1176), the rest was denied not out of disparagement of any one's rights, but because two of the topics are irrelevant and the other immaterial (FPC Rules 1.26). The topics were: (a) whether dehydration on the platforms prepares the gas sufficiently for long distance transmission, (b) on which measurement Tennessee pays for its purchase, and (c) testimony of a learned economist as to where the area price proposed in another docket should be applied. Neither (a) or (c) is controlling *here*, and point (b) is insignificant once it is agreed title passes at the outlet of Jupiter's plant.

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IX

COST OF SERVICE APPLIED TO THE TRANSPORTATION FOR PURE

While Pure is not a party here, and may not be aware of this proceeding, its undertaking carried forward into the Commission's order on its rate settlement, as quoted on page 11 above, is clear and indubitable that if and when Jupiter's 3.4-cent rate reduces for any reason, the benefit will pass on to Tennessee and will necessarily affect Tennessee's cost of service and have its eventual effect on Tennessee's resale price and the consumers' costs. For completeness of the record it may be appropriate to suggest that the Secretary send a copy of the order here subjoined to the Pure Oil Company at its recorded address. Finally, it hardly seems necessary also to incorporate in the order an enjoinder that Tennessee no longer continue to pay whatever price is invoiced to it (confessedly assuming it to be correct, 6T912), but shall take care to adjust its payments according to the change in Jupiter's rate.

This procedural refinement is essential if the result of the proceeding is to benefit consumers. The point is the rate being altered by the attached order is Jupiter's rate to Pure, and the rate order does not change Tennessee's costs or the consumer's burden until Pure does in fact pass the rate benefit on to its customer, Tennessee. Pure's rate to Tennessee is not technically in this case, but in view of the undertaking quoted, as cited above, there is no reason to doubt that the benefit will be transferred as soon as it occurs, nor to doubt that it will create its reaction in Tennessee's cost of service and eventually in Tennessee's rates, leading to a reduction in consumers' costs.

However, to all of this transfer of the benefit on to Tennessee for the consumers, Jupiter flatly objects, pointing out that the 1957 arrangements and contracts made Jupiter's charge purely upon Pure alone. Jupiter protests it was not a party to Pure's 1962 rate settlement, ostensibly knew nothing about it, and did not consent to Pure's transfer to Tennessee of the economic incidence of Jupiter's charge. Jupiter points to some undefined but "elementary contract law that where considerations are exchanged and relationships are established among three parties to a single contract, and ancillary two-party contracts are executed in consideration of that three-party agreement, two of the parties may not thereafter amend the basic three-party relationship without the consent of the third party." (Brief, page 30.)

The answers to this casuistry are three —

(a) No citation is given for this "elementary contract law", and this *forum* is not aware of it, nor of its applicability here;

(b) The 1957 contracts do not contain any restriction on the freedom of Pure and Tennessee to revise the price arrangement between them;[23] and

(c) The change is not of concern to Jupiter or harmful to it — Pure is still the contracting party bound to pay Jupiter's price. Pure has merely indemnified itself by getting agreement from Tennessee, as its customer, to pay or receive the effect of any change in this one element of Pure's costs. As such, agreements of this kind are quite common, as in the case of price adjustment clauses for changes in cost of fuel or of purchased gas, or in the many outright "cost of service" rates where the entire rate goes up or down as the costs change. It is novel, and flatly unacceptable for Jupiter to announce a new doctrine that a purveyor of service to a utility has standing to object to the utility's passing on his charges *pro tanto* to the utility's customers.

The area rate case and its application: At least understandable, if not agreed to, is Jupiter's further point, applicable mostly to the transportation rate for Pure, to the effect that the pending area-rate producer price proceeding will moot this entire rate matter (Docket AR61-2, on which hearings lately closed). The syllogism is this:

(a) The area rate decision, when it comes, will fix a flat price for Pure's on-shore sale to Tennessee;

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[23] In fact, flatly contrary to Jupiter's claim is the following express language of its own contract, the paper of January 2, 1957, entitled "Agreement Relating to Contracts" and signed in the name of Marine by President Liese, by Pure as the seller and by Tennessee as the buyer (from copy in docket file G-12583, p. 14):

"During each of the additional respective periods from November 1, 1958, to November 1, 1962, November 1, 1962, to November 1, 1966, and November 1, 1966 to the expiration of the term hereof, the price per MCF to be paid shall be determined by agreement between Buyer [Tennessee] and Seller [Pure] . . ."

(b) Since it will be a flat price, only Pure will be affected thereafter by Jupiter's transportation charge to Pure and Tennessee's costs will not escalate or descend upon a change in Jupiters rate;

(c) Thus the premise of this proceeding fails since the ultimate charge to the public consumers will no longer be affected;

(d) All the more would this be true if, as claimed above by Jupiter, Pure's price adjustment proviso (changing its total price according to its transportation costs incurred) were invalid and ineffective.

It is a too simple answer, really an oversimplification, as made by the Staff's reply brief, to the effect that the area rate case is still in process and it need be considered only when its result unveils. Conceivably, that case might become effective before this one; anyway, with the Commission so far committeed to the area price policy, it would be irresponsible indeed to ignore its incidence here.

Jupiter presupposes that the area rate will fix Pure's price to Tennessee for its delivery on shore, *ergo*, any surveillance of Jupiter's price or rate will affect only the producer and mean nothing to Tennessee or its customers down the line. In its reply brief, the Staff concludes, "It may be that as a result of the Commission's determinations with respect to area rate policy in Docket No. AR61-2, the public will no longer be affected by Jupiter's transportation charge

to Pure." How that could be true is not developed, explained, or here apprehended.[24]

[3175]

Perhaps it is enough that even if Jupiter were right, it is wrong. Even if, under an area on-shore flat rate, Pure were to be the only *direct* beneficiary of a reduction in Jupiter's price for transportation, still Pure is as much a part of the public as is any other recipient of the services regulated by FPC, and the law's prescription of just and reasonable rates for transportation of gas in interstate commerce does not deny producers any benefit therefrom. But more to the point, the costs incurred by producers generally are of course most significant in fixing the area rate; and, when a cost element of the producer's sale price covers the receipt of a jurisdictional service—transportation—that cost must be regulated if the purpose of the law, fair prices to consumers, is to be served.

The cost of service applied: In Chapter VII above it is developed that the allowable cost of service for Jupiter's two services is $334,859 per year. In Chapter VIII, the proportion applicable to the K-M-P resale arrangement was fixed at $128,854, based on the volumetric ratio. The balance,

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[24] A much more realistic view of the forthcoming area rate appears to be the rationale of a pleading filed for the FPC in the Court of Appeals for the Seventh Circuit on October 27, 1965, in *Jupiter Corporation* v. *F.P.C.*, where Jupiter seeks an order permitting its reintervention in the area rate proceeding. In the pleading it is pointed out that even if the area price should cover the transportation to the on-shore terminus of the pipeline and the cost of that transportation were to come out of the area rate received by the producer, in any event such jurisdictional transportation service by Jupiter, even if performed for the producer, would be for regulation by FPC on a cost of service basis. In other words, whether the area rate is offshore or on shore, Jupiter's price necessarily will affect the consumer either directly or indirectly and requires to be regulated accordingly.

or $206,005, is chargeable for Jupiter's service to Pure under Jupiter's rate schedule. As in the case of the K-M-P resale, with the volumes expected to decline while the expenses remain relatively constant, there is no reason to inflict upon Jupiter a flat rate per Mcf, nor *vice versa*. Accordingly, the order here subjoined directs the revision of Jupiter's FPC rate schedule No. 7 (Item D here) to limit each monthly charge, otherwise at the contract rate, to one-twelfth of $206,005, or $17,167.08, except that the invoice for December of each year may make up any deficiency for that year.

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X

STATE TAX REIMBURSEMENT RETAINED

Of all the remarkable aspects of this case, none is more amazing than the disposition of about $2 or 3 million of an extra charge by Jupiter against its customer, Tennessee (and thus upon *their* customers down the line), for the State of Louisiana gas severance tax, but never paid over to the producers or to Louisiana or to anyone else. What is more, this question is not mentioned in the order giving rise to this case, nor is it discussed in any of the evidence filed in advance of the hearing. Instead, it developed only due to the assiduity of counsel for the different interventors, who questioned certain figures in the tables of the Staff exhibits.

The background is this: In 1958 (3 years before Jupiter took over the operation), there was enacted by Louisiana an increase in the gas severance tax, which became effective December 1, 1958, see Order No. 210, 20 FPC 785. The tax is laid on the producer. Because of a jurisdictional dispute between the United States and the State of Louisiana as to the status of offshore production, there was

then, at least, some question whether the State tax would apply to the Rollover field production located about nine miles from shore.

No question here arises about the 60 percent of the gas that comes from Pure's production transported by Jupiter because Pure concluded (evidently) that its production is not subject to the tax, at least they have not sought any reimbursement from their buyer, Tennessee. But for the rest, the sale and resale of K-M-P's gas, the two producers apprehended the possibility they might some time be called upon to pay the tax and, accordingly, filed increases in their rate to Jupiter of 1½ cents per Mcf, representing the share of the tax increase which their sales contract entitles them to collect over from their buyer (at least entitles them to reimbursement if and when they pay the tax). But the two producers regarded the filing as merely a protective step and (since they have not paid the tax to the State) they have not at any time invoiced Jupiter to pay the increase. Instead, the producers continued to invoice their buyer at the old rate of 18.9333 cents, not the new rate of 20.4333 cents called for by their rate filing which the Commission permitted to become effective December 1958.

In the same month of December 1958, Jupiter (then Commonwealth), assuming their seller (K-M-P) would be charging them according to their rate filing of a week before, quite justifiably filed a corresponding rate increase as a supplement to their Rate Schedule No. 8, which increased their price to Tennessee to 22.8333 cents. Note that the gross amount of 22.8333 cents is the sum of the three charges, 18.9333 cents as Jupiter's cost of gas, 2.4 cents for Jupiter's transportation margin and 1.5 cents for the expected tax reimbursement. Their invoices to Tennessee carried out the rate filing.

Thus the trouble arises—Jupiter for seven years has been collecting this 1½-cent tax item from Tennessee, to the amount of about $300,000 per year, but has never actually been called upon to pay it over to the producer for whom it was collected, nor has the producer been called upon to pay it to the State. If the entire collection had been held in escrow, or set aside in a trust account in the bank, perhaps no question would now arise, at least in this case. Instead the amount has been taken up as revenue and used in operations and perhaps dividends.

There is a tax item set up as a reserve in Jupiter's books in the amount of $516,374 which Jupiter's brief, page 79 now suggests is solely attributable to the years before December 1958, when their sale was not to Tennessee but to the Canadian concern, Niagara Gas. As explained in Chapter IV above, the Commission at that time regarded the sale to Canada as nonjurisdictional and in its recent certificate decision[25] declined to reconsider or readjust that conclusion. Jupiter now claims the total amount actually involved, meaning the collection between December 1, 1958 and December 31, 1964, is $1,838,067. But its own annual report for 1964, in evidence as Ex. J-19 contains their auditor's footnotes stating, with respect to the Louisiana tax:

"The Jupiter Corporation (since March 1, 1962) and Commonwealth Oil Company prior thereto have collected certain Louisiana gas gathering and severance taxes on gas sold which was purchased and gathered from Gas wells located in the Gulf of Mexico in an area claimed by both Louisiana

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[25] Opinion No. 470, August 11, 1965, issuing a certificate to K-M-P and a "temporary" to Jupiter, both at slightly lower prices, see Chapters IV and VII above. On December 7, 1965, Jupiter filed for review of that opinion in the Court of Appeals for the Seventh Circuit.

and the United States. In addition to the $516,374 shown in the consolidated balance sheet as provision for gas gathering and severance taxes, Jupiter and Commonwealth have collected since 1958, $2,769,309 of such taxes which, on the basis of the position taken by the Internal Revenue Service on examination of Commonwealth's tax returns, have been recorded as income in the tax returns and accounts of the companies. The ultimate liability, if any, for the amounts so collected (including the amounts taken into income) cannot be determined until the dispute between Louisiana and the United States is settled. The amount of such taxes included in revenue in 1964 is $294,555. Counsel for Jupiter is of the opinion that the ultimate liability for the taxes collected will not exceed the provision of $516,374."

[3178]

The net result is that some amount in the neighborhood of $2 to $3 million has been collected by Commonwealth-Jupiter from its pipeline customer, Tennessee, by Tennessee from its distributor customers, and by them from their customers, the consumers. Yet, not one dollar of this amount has been paid over to the producers or to the State of Louisiana, or has been claimed or levied by the State of Louisiana, or billed by the producers to Jupiter; nor has it been set aside in escrow in recognition of the trust so obviously resulting. For this patently unsavory situation, it is difficult indeed to find any participant who has not his share of blame.

First, the State of Louisiana appears (K-M-P Brief, p. 11) to rely upon some sort of understanding with the Federal officials that, upon ultimate resolution of their entire litigation, the taxes would be paid, should Louisiana prevail, to which Phillips has agreed. Second, the producers have contributed their share by filing here a formal rate

increase they did not intend to charge and have not charged — this notwithstanding the plain language of the law (Sec. 4) that every natural gas company shall file with the Commission schedules showing "all rates," which surely means the rates actually being charged. Instead their filing of December 24, 1958, was accepted in good faith by the Commission and given the number, Supplement No. 8, showing in plain figures the former price as stated, the tax reimbursement of 1.5 cents, and the total price of 20.43333 cents. (Phillips' filing of December 22 is Supplement No. 11). Now, seven years later, it develops the filing does not reflect the charge in effect at all. The only explanation is the weak and ineffective one that Kerr-McGee filed to protect themselves against the imposition of the tax, but deemed it unwise to collect the reimbursement from Jupiter. Why it was also deemed unwise to correct the rate filing here or otherwise disclose the facts to the Commission is not explained. What is more, all of the reimbursement contracts, from the producer on down the line, refer to the tax "being levied" as the basis for reimbursement, and the plain fact is not a dollar of tax in this matter has actually been levied at any time since December 1958.

Jupiter's filing of the 1½-cent rate increase in December 1958 was an appropriate reaction to the same increase filed by their suppliers, but that does not explain the continuation of the filing and the charge thereunder to Tennessee after it developed that K-M-P were not in fact collecting the amount from Jupiter. The suggestion that some sort of oral tender was made by Jupiter to Phillips and Kerr-McGee is not supported by recorded evidence. The only explanation for the continued collection is the need to protect their interest against the possibility that the producers might sometime be called upon to pay, and therefore to collect over the amount, both currently and retro-

actively. But this does not explain why [3179] there could not have been entire reliance on their action over against Tennessee for reimbursement for any such payment, if and when required to be made by them. Neither is there any significant explanation why the amount has been taken up as corporate income instead of being set aside as a liability and reserve.

It is equally unclear why Tennessee has consistently paid this amount unquestionably ever since it was first billed in 1959. Their witness tells us they buy from several hundred producers in the area and are paying the tax to some of them on the understanding the producers are indeed paying it over to the State of Louisiana. Jupiter's is said to be the only case of its kind among Tennessee's gas sources in Louisiana (7T1165), in view of which Tennessee's readiness to pay the tax item included in each monthly invoice without verifying that it was a real *reimbursement* can hardly be understood in light of the specific language of Jupiter's rate filing, Supplement No. 5 to its Rate Schedule No. 8. What is more, there is certainly no agreement here with Tennessee's caveat at page 11 of their brief to the effect that if and when this $2 or $3 million is refunded to them, Tennessee is not obliged to remit the amount in specie to its customers. Their rate settlement agreement of 1962 has nothing to do with it. The fact is that the entire collection, at each successive step by the distributors from the consumers, by Tennessee from the distributors, and by Jupiter from Tennesseee, was made for the special purpose of paying the tax to Louisiana and upon the implied representation it was needed for that purpose. With that purpose failing, there arises, under ordinary principles, a constructive trust,[26] unrelated to and unaffected by any other revenues or expenses, profits or losses in the respec-

[26] Restatement, Restitution, Ch. 9.

tive gas sales, and as and when any refunds are achieved they will be for payment over accordingly.

Now that the entire question has been brought out at the hearing, the Staff's brief has joined in the recoommendation that the increase under the supplement just mentioned should cease to be collected and that the amount heretofore collected should be set aside in an escrow account.

Finally, Jupiter cautions that this is a Section 5 rate investigation which means that it may not encompass a retroactive reparation order. However, that does not affect an accounting order by the Commission, made under Sections 4, 5, 8, 16 or other provisions of the law, and requiring that the funds collected be truly shown on the books for what they are, namely, a reserve liability.

[3180]

The order also amends Supplement No. 5 to Jupiter's Rate Schedule No. 8 so as to cancel that increase and cease its collection henceforth. The point is there is now only the faintest, most far-fetched basis for apprehension of any tax liability at all — the Supreme Court has since held in so many words: "We decide now only that Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines, wherever those lines may ultimately be shown to be."[27] While the Court has retained jurisdiction to settle any dispute as to the actual location of the coast, see its order of December 13, 1965 in No. 9 original, there has not been explained to this record why any possibility is foreseen of a Louisiana tax here since all the wells about nine miles offshore.

In any event, if and when it ever comes to pass that Louisiana should assess its tax and attempt to levy it upon the

[27] *US v. Louisiana* (1960) 363 U.S. 1, 79, *cf.* the Submerged Lands Act of 1953, 43 U.S.C. 1301.

producers, it will be time enough to reconsider what reimbursements are thereafter in order. As to the past years, dating back to 1958, any attempt to levy the state tax up to eight years or more retroactively would obviously be subject to the most serious question of validity as an undue burden on interstate commerce. As of right now, the producers have not paid it or been called upon to pay it, and no reimbursement is called for, due, or required.

Finally, if there be any problem or lack of agreement in any of these connections, it is called to attention that this entire sale is still under a temporary certificate, see Opinion No. 470 cited above, and the Commission is free, in deciding whether *any* permanent certificate is here *required* in the public interest, to attach an appropriate condition equally required in the public interest. *United Gas Improvement Co.* v. *Callery Properties* (December 7, 1965) .... U.S. ....

[3181]

XI

TENNESSEE'S CERTIFICATE APPLICATION

It remains only to pass upon Tennessee's application in CP65-58 for a certificate to license their proposed lease of Jupiter's lines and facilities, which was consolidated with the Section 5 investigation by the Commission's order of October 30, 1964. Parenthetically, both Tennessee and Jupiter object mightily to the consolidation, but on no discernible ground except that it is a very unusual practice, which is something short of a showing of illegality.

Tennessee's proposal contemplates leasing the facilities outright for a rental fee of $100,000 per month, less operation and maintenance expenses incurred. Since Jupiter would then be eliminated from the operation, the proposal

also is for Tennessee to take over Jupiter's contract with the two producers, accept delivery and title to the gas as the respective offshore platforms, pay to K-M-P Jupiter's present purchase cost, and pay to Pure the net rate settlement price of 16.75 cents, eliminating the 3.4 cents reimbursement for transportation charges now being paid by Pure to Jupiter. Jupiter has agreed to the tentative arrangements and endorses the application. K-M-P take no position: Pure is not here.

The first advantage cited by Tennessee in proof of the public convenience and necessity of the new arrangement is the immediate savings of $200,000 per year, since their cost will be $1,200,000 per year instead of the amounts now being paid out, as explained in Chapter VII. Realizing the obvious and invidious comparison between that cost, $1,200,000, and the cost of service as developed in the staff's evidence filed six months ahead of this application, Tennessee cites a number of other advantages, i.e. —

(a) The larger reductions proposed by the staff take place when and if its proposed order under Section 5 becomes final, whereas the $200,000 per year savings becomes effective immediately upon consummation of the arrangement with the Commission' approval of the certificate.

(b) There is available an unused capacity in the lines amounting to 43,000 Mcf per day which Tennessee could use as lessee: provided, however, some one discovers, develops, and produces the new gas to make use of that potential.

[3182]

(c) There are operating advantages in balancing their purchases from the producers without considering intermediate commitments to Jupiter.

(d) In later years, after 1974, Tennessee as lessee will be in a better position to renew the purchase contract with K-M-P.

Advantage (a) is now mooted with the consolidation. The other three advantages are useful and significant and would go to establish the law's standard, "public convenience and necessity" if the remaining condition or circumstances, namely the price, equally meet that standard. It is the staff's conclusion that the excessive price far outweighs the advantages, which is plainly correct. Recalling the Supreme Court's enjoinder in CATCO that the Commission's certificate function must exercise a responsible reaction to the price, and since the operating advantages cited by Tennessee are the sort of thing that should appear in any case even at a reasonable price, it would be hard to imagine how the price proposed could be thought to justify the Commission's approval of a lease of facilities at a cost roughly four times the amount that has been concluded to be the fair overall price for their service.

There was some suggestion that the certificate should issue nevertheless, but on condition reducing the price for rental to equal the cost of service concluded upon. Two difficulties arise which would first want to be resolved — Jupiter has announced that a decision in their case limiting them to the cost of service would be so drastic as possibly to require the liquidation of the entire enterprise, hence it is not clear that a lease would be satisfactory or in the public interest with the lessor so minded. Secondly, it was testified that at various times three of the prominent stockholders of the original organization, Marine, were top officials of Tennessee, the proposed lessee, although it was believed they were not stockholders at the time Tennessee's contracts were made with Pure. Further, it was the under-

standing their shares have since been disposed of. Accordingly, any resumption of the lease proposal would require some appropriate certification on both points, i.e., (a) that the lessor is in business and expects to continue, and (b) that there is no interlocking ownership of the sort stated and the arrangement proposed can be approved as indeed an arm's length transaction.

Accordingly, it is the conclusion that the lease as proposed does not meet the standards required by the law and that the application for the certificate must be denied.

[3183]

XII

FINDINGS AND ORDER

Based on the evidence herein it is specifically found that:

(1) Jupiter is engaged in the transportation of natural gas in interstate commerce for the Pure Oil Company in the Rollover Field, subject to the jurisdiction of the Commission under the Natural Gas Act.

(2) Phillips-Kerr McGee make a sale of natural gas in the Rollover Field to Jupiter in interstate commerce for resale, and Jupiter makes a sale of such gas to Tennessee in interstate commerce for resale, subject to the jurisdiction of the Commission under the Natural Gas Act.

(3) Jupiter's transportation of gas in the Rollover Field and the performance of related services does not constitute a gathering service and is not exempt from the Commission's jurisdiction under the Natural Gas Act.

(4) To the extent that Jupiter performs any gathering at all in the Rollover Field it is completed at Pure's Platform "A" and Phillips-Kerr McGee's Platform "A", and such gathering does not exempt Jupiter's Rollover Field operations from the Commission's jurisdiction.

(5) Jupiter's current contractual charges for the transportation of gas in the Rollover Field and for the sale of gas to Tennessee are unjust and unreasonable.

(6) The just and reasonable annual cost of service for the transportation of gas by Jupiter in the Rollover Field is $334,859, and the respective rates should be adjusted pro rata within that total.

(7) Jupiter should cease collection from Tennessee of the 1.5 cents per Mcf severance tax reimbursement.

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(8) Jupiter should place in an escrow account the amounts accumulated by Commonwealth and Jupiter representing the 1.5 cents per Mcf tax reimbursement, since November 5, 1958, subject to refund if the State of Louisiana severance tax is declared inapplicable.

(9) Jupiter's motion to dismiss the proceedings should be denied.

(10) The issuance of a certificate of public convenience and necessity to Tennessee in Docket No. CP65-58 is not in the public interest and Tennessee's certificate application should be denied.

ACCORDINGLY IT IS ORDERED, subject to review by the Commission, that:

(A) From and after the effective date of this order, the total charge by Jupiter for its transportation service for Pure Oil Company under FPC Rate Schedule No. 7 and for the services therein described may not for any month exceed the sum of $17,167.08, except that the invoice for December of each year may provide for any adjustment needed in that calendar year resulting from an annual limitation in the amount of $206,005 for such transportation.

(B) From and after the effective date of this order the total rates and charges made by Jupiter to the Tennessee Gas Transmission Company for the sale of gas under Jupiter's FPC Rate Schedule No. 8 may not, for any month, exceed the sum of the following:

(1) The cost of gas for that month purchased for resale to Tennessee by Jupiter under Kerr-McGee's FPC Rate Schedule No. 56 and under Phillips Petroleum Company's FPC Rate Schedule No. 329 at rates lawfully in effect for the sale of gas to Jupiter by the two producers, respectively, plus

[3185]

(2) The flat monthly sum of $10,737.83, except that the invoice for December of each year may provide for any adjustment needed in that calendar year resulting from an annual limitation in the amount of $128,854 in its total selling price (less the total cost of purchased gas in that calendar year).

(C) From and after the effective date of this order Jupiter shall no longer continue to invoice and

charge Tennessee, its buyer under Rate Schedule No. 8, the 1.5 cents tax "reimbursement" charge referred to in Supplement No. 5 to Jupiter's Rate Schedule No. 8, but this is without prejudice to any new filing that may hereafter be made to reflect any change hereafter in the status of the Louisiana severence tax or in Jupiter's reimbursement obligation to the two producers.

(D) Upon the effective date of this order, Jupiter shall journalize and give full effect to an accounting entry in its corporate books of account charging the retained earnings account and crediting an appropriate reserve entitled "Provision for Reimbursement of Louisiana Severance Tax" in the entire amount of the tax reimbursement portion of its sale price which Jupiter has collected since November 5, 1958, under Supplement No. 5 to its Rate Schedule No. 8, and shall furnish to the Commission full report of such action under oath, showing the basis for the computation of the amount of the entry, subject to the further order of the Commission.

(E) For the reasons stated severally herein, there is hereby denied Jupiter's motion to dismiss the proceeding and terminate the investigation as filed on May 3, 1965, 2T286.

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(F) The application of Tennessee in CP-65-58 for a certificate of convenience and necessity licensing the leasing and operation of Jupiter's lines and plant is denied, without prejudice to its resubmission in proper terms.

(Signed) WILLIAM L. ELLIS
William L. Ellis
Presiding Examiner

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APPENDIX

Cost of Service Revision to Reflect Depreciation On Recoverable Gas Reserves Basis

The Staff's cost-of-service study (Ex. S-1) for Jupiter's transportation function (*i.e.*, excluding cost of purchased gas), allowing return at 6½%, develops an annual cost of $274,259, on the basis that a net plant of $664,508 remains after a depreciation reserve of $929,378, that being the "per books" figure resulting from the accelerated depreciation allowable under the Internal Revenue Code. Adjustment of this cost of service to reflect a more normal reserve for depreciation as related to plant in service is as follows:

1. Adjusted Net Plant:

	Per Examiner	Staff Ex. S-1
Average gross plant, 1962	$1,593,886	$1,593,886
Depreciation reserve (Note A)	431,624	929,378
Net transportation plant account	$1,162,262	$ 664,508
Allocation of net general plant	10,868	10,868
Adjusted average net plant	$1,173,130	$ 675,376
Working capital	—	—
Total transportation rate base	1,173,130	675,376
Return at 6½%	$ 76,253	$ 43,899

Note A: When Jupiter bought up the Commonwealth-Marine properties at the end of 1961, it was on the basis of a study showing that the gas transportation function in the Rollover (Louisiana offshore) field had total recoverable gas reserves of 1,337,419 MMCF, of which 362,133 MMCF

(or 27.08%) had been recovered by December 1, 1961 (6T999). Computing depreciation in that proportion for 1962, there results a reserve of $431,624, or less than half the amount accrued "per books."

By way of verification, if there were to be found applicable, a rather normal pipeline service life of 33 years. (3.03% annual rate) and a depreciation reserve were computed on the customary straight-line basis (ignoring salvage), the accumulated reserve as of January 1, 1963, after nine years service, comes close to the same amount, *i.e.*, $434,696.

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2. Income Tax Adjustment on Allowable Return:

Increasing the net return from $43,899 to $76,253 requires a corresponding change in the income tax allowance, as follows:

	Examiner	Staff Ex. S-1
Gross income from return allowance	$ 76,253	$ 43,899
Expense deductions for taxable net income:		
Allocation of interest expense (Note B)	4,760	3,006
Statutory rate adjustment	13,542	13,542
Total deductions:	$ 18,302	$ 16,548
Taxable income base	57,951	27,351
Federal income tax on above base	53,493	25,247

Note B: The increase in the depreciated net plant in transportation service (par. 1 above) results in a small increase in the allocation of general firm interest expense and reduces to that extent the taxable income base.

3. Cost of Service as Adjusted:

Total cost of service per Staff Exhibit S-1		$4,146,911
Less cost of purchased gas		3,872,652
Staff's net cost of service for transportation (S-2)		$ 274,259
Return allowed in par. 1 above	$ 76,253	
Return allowed in Staff Ex. S-1	43,899	32,354
Income tax allowance in par. 2 above:	$53,493	
Income tax allowed in Staff Ex. S-1	25,247	28,246
New transportation cost of service as adjusted by Examiner		$ 334,859

Cost applied to 1962 volumes:
$334,859 ÷ 52,995,852 Mcf = .632¢/Mcf (compared with .518c in Staff Ex. S-2, Sch. 4).

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CAPTION

[3224]

BEFORE THE FEDERAL POWER COMMISSION

	Docket Nos.
THE JUPITER CORPORATION	RI63-212
TENNESSEE GAS TRANSMISSION COMPANY	CP65-58

BRIEF ON EXCEPTIONS OF COMMISSION STAFF

Statement of the Case

These consolidated proceedings involve an investigation under Section 5(a) of the Natural Gas Act of the rates and charges of The Jupiter Corporation (Jupiter) for the transportation of natural gas subject to the jurisdiction of the Commission in the Rollover Field offshore South Louisiana (Docket No. RI63-212), and an application of Tennessee Gas Transmission Company (Tennessee) for a certificate of public convenience and necessity, under Section 7(c) of the Act, for authority to lease and operate the offshore facilities in the Rollover Field and related onshore facilities now owned and operated by Jupiter.

The Commission Staff determined a rate of .518 cents per Mcf for Jupiter's transportation of gas in the Rollover Field based upon a cost of service for Jupiter's Rollover Field activities and recommended denial of Tennessee's certificate application for the reason that the proposed annual lease rental charge greatly exceeded the annual amounts Tennessee would be required to pay Jupiter under Staff's rate of .518 cents per Mcf. Staff's cost of service and allocation showed that Jupiter is collecting revenues of

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[3229]

expenses would in turn require a downward adjustment of Jupiter's Federal income tax allowance for the test year. The Examiner made neither of these adjustments.

Exception No. 2

Staff excepts to the Examiner's assignment of the company's entire cost of service of $334,859 to Jupiter's jurisdictional transportation operations. There are nonjurisdictional operations involved in Jupiter's Rollover Field operations, consisting of Jupiter's transporation of condensate (commingled in the same lines with the gas) from the producers' offshore platforms and the removal of liquids, from the gas transported, at Phillips' extraction plant onshore[1] to which costs should be allocated.

Argument

The Examiner's failure to allocate a portion of the cost-of-service to nonjurisdictional operations allows Jupiter to recover charges over and above its jurisdictional cost of service. The staff allocated the cost of service of $274,259 to nonjurisdictional operations as shown on Schedule 4 of Exhibit S-2. The costs so allocated appear at Column (3), Lines 3, 7 and 9 in the top part of that schedule. The costs shown at Lines 3 and 7 are based upon related volumes in Column (2) which represent the shrinkage and fuel in Phillips' plant.

[3230]

If the Examiner had allocated costs to nonjurisdictional operations on the basis of Staff's Exhibit S-2, Schedule 4, he

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[1] Phillips extracts and sells the liquids for Jupiter and shares with Jupiter the revenues from those sales.

would have arrived at a jurisdictional cost of service of $315,604 instead of $334,859.

In connection with this exception reference is made to the Examiner's statement (Dec., p. 19) that the Staff did not deduct $82,200 in revenues from the sale of liquids from Jupiter's cost of service, thus allowing Jupiter to retain $82,200 of revenues in excess of its cost of service. Staff points out that it is not necessary to make such deduction since we have allocated costs to the liquid volumes extracted at Phillips' plant.

Exception No. 3

The Staff excepts to the Examiner's determination of a limited monthly charge for Jupiter in lieu of a unit charge per Mcf as recommended by Staff.

Argument

The Examiner finds that a unit rate per Mcf has the effect of reducing Jupiter's return as the volumes transported decline when in fact the expenses are expected to remain relatively constant. He establishes a monthly charge in order to insure against unjustified changes in the return due to changes in volumes either way.

The record shows that Jupiter does not expect a decline in volumes until 1970 (Exhibit J-14). The Commission fixes rates for a reasonable future period and not for an indefinite period. Furthermore, the Examiner ignores Jupiter's declining rate base. Even if

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CAPTION

[3336]

UNITED STATES OF AMERCIA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of
THE JUPITER CORPORATION } Docket No. RI63-212

OFFER OF SETTLEMENT

Pursuant to the provisions of Section 1.18 of the Commission's Rules of Practice and Procedure, The Jupiter Corporation (Jupiter), the Respondent herein, herewith submits the following Offer of Settlement.

I.

BASIS FOR SETTLEMENT

Jupiter hereby offers to file appropriate rate schedule changes which would establish a future charge of 1.25 cents per Mcf for the natural gas which it delivers to Tennessee Gas Transmission Company (Tennessee) at Jupiter's Rollover Plant. Jupiter further offers to refund to such persons and upon such terms as the Commission may prescribe, an amount of $800,000, in order to terminate this proceeding and resolve and dispose of any and all claims relating to Jupiter's past and present rates and changes.

[3337]

The rates subject to investigation in this proceeding are Jupiter's charge of 3.4 cents per Mcf under its Hydrocarbon Gathering and Separating Agreement (Rate Schedule No. 7) with Pure Oil Company (now Union Oil Company of California) and Jupiter's 2.4 cents per Mcf margin between the cost of gas purchased by it from Phillips Petroleum

Company (Phillips) and Kerr McGee Corporation (Kerr McGee), and the price at which such gas is sold to Tennessee Gas Transmission Company (Jupiter's Rate Schedule No. 8). Jupiter's current average revenues from these transactions approximates 3 cents per Mcf.

Examiner Ellis has recommened that Jupiter's charges be reduced to an amount equivalent to 0.632 cents per Mcf, which represents an 80 percent reduction in Jupiter's revenues. The Examiner would require Jupiter to establish a reserve of $2,000,000 relating to so-called Louisiana Severance Tax reimbursement charges and he suggests that a refund in that amount could potentially be required of Jupiter. The completely disastrous effect upon Jupiter of such a reduction in current charges, coupled with refunds of such magnitude, are detailed below.

In order to dispose of this proceeding in a manner consistent with the public interest, and at the same time protect Jupiter's stockholders from complete liquidation, Jupiter hereby offers to reduce its gathering revenues by over fifty (50) percent. Additionally, Jupiter will agree to contribute to an appropriate trustee or escrow account an [3338] amount of $800,000, which is approximately the amount of so-called "tax reimbursement" collected since the date of the Commission's order initiating this proceeding on December 5, 1962.

Finally, Jupiter suggests that an equitable resolution of this case requires either a reformation of its various contract with the Rollover Field producers (Pure, Phillips and Kerr McGee) to require those producers to pay Jupiter, or Commission permission for Jupiter to retain, charges for the gathering of natural gas, and for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids. Thus, Jupiter anticipates that, with appropriate revisions of its contracts, or with Commis-

sion consent, the charge for the jurisdictional deliveries of gas made by Jupiter can be reduced to a level of 1.25 cents per Mcf, with Pure, Phillips and Kerr McGee paying reasonable charges for Jupiter's services related to their liquids.

II.

THE IMPACT OF THE EXAMINER'S DECISION

When Jupiter acquired Commonwealth Oil Company in March, 1962 it issued to the owners of Commonwealth, 559,899 shares of its preferred stock with a stated annual dividend of $1.50 per share, payable out of the income of the gas gathering operation acquired from Commonwealth. [3339] There are at present over 3500 stockholders holding this preferred stock. Many investors rely upon their investment in this stock for necessary income.

When the Commonwealth-Jupiter merger was consummated in March of 1962, there was no reason for the stockholders of either company to believe that Commonwealth's revenues were in jeopardy or subject to attack. The service rendered for Pure had been authorized by the Commission in July of 1958 at Docket No. G-12583 (20 F.P.C. 894). The Phillips-Kerr McGee-Marine transaction had been fully disclosed in the proceeding which authorized Tennessee to transport gas for Niagara Gas Transmission Company (12 F.P.C. 311). Further, in June of 1960 a Commission Examiner had recommended issuance of a certificate of public convenience and necessity to Commonwealth without any reservation as to the margin retained by Commonwealth for gathering the Phillips-Kerr McGee gas (See Decision of Examiner Binder issued June 17, 1960 at Docket Nos. G-16611, *et al.*).

Thus both Commonwealth and Jupiter had good cause to believe that the Commission had full knowledge of Com-

monwealth's operations, and that the gathering revenues were not considered to be unreasonable. The merger, and the issuance of preferred stock with an annual dividend obligation of approximately \$840,000, was predicated upon the assumption of the stability of gathering income.

[3340]

If the Examiner's recommended 0.632 cent charge were put into effect the annual dividend on the preferred stock would drop from \$1.50 per year to approximately 25 cents per year, or less. The market value of the preferred stock, resulting solely from this reduction in income, would be cut drastically. There would be an adverse impact on Jupiter's common stock of substantial proportion. Compliance with any required refund in the magnitude of \$2,-000,000 would seriously affect the overall financial position of the corporation and would have extremely serious implications for both Jupiter's common and preferred shareholders.

Jupiter believes that it has valid legal and equitable defenses against the Examiner's decision. Jupiter has moved to protect itself not only by filing Exceptions to that decision but also by appealing the Commission's decision excluding Jupiter from intervening in the proceeding at Docket No. AR61-2 (*Jupiter Corp. v. F.P.C.*, CA7, Case No. 15396) and the Commission's decision rendered in Opinion No. 470 (*Jupiter Corp. v. F.P.C.*, CA7, Case No. 15469).

Jupiter recognizes that the resolution of all of these matters will be time consuming and expensive for all parties, and that final court decisions might not be completely favorable or even satisfactory either to Jupiter or to the Commission. Jupiter believes that this Commission can properly effect a reasonable and equitable settlement of these **[3341]** matters in order to protect both consumers and stockhold-

ers and to avoid the expense and uncertainty of continued litigation of these matters.

III.

CONTRACT REVISIONS ARE NECESSARY FOR AN EQUITABLE DISPOSITION OF THIS PROCEEDING

The Staff witness who presented and sponsored the Staff's recommendations during the trial of this case, explicitly recognized that the services which Jupiter renders to Pure, Phillips and Kerr McGee include many services which are not subject to Commission jurisdiction under the Natural Gas Act. He stated that Jupiter could charge "anything it pleases" for such service as transporting condensate or liquefiable petroleum gases for the Rollover Field producers (Tr. 394-5). The difficulty with such a suggestion is that Jupiter's contracts with such producers do not provide separate charges for jurisdictional and for non-jurisdictional services. If, for example, Jupiter's rate for gas sold to Tennessee is reduced, that may also reduce the price payable by Phillips for fuel at the Phillips plant. Some method should be found to preserve Jupiter's contractual right to charge for non-jurisdictional services despite adjustments of or reductions in its charges for services deemed to be jurisdictional.

The charge to Pure is determined on an Mcf basis even though that charge compensates Jupiter for services other than the gathering or [3342] transportation of natural gas. The settlement of the rate proceedings of The Pure Oil Company at Docket Nos. G-16790, *et al.* (28 F.P.C. 889), provided that Tennessee should pay Jupiter's entire charge for hauling Pure's gas, condensate and other liquids. Thus at present, as a result of the settlement in the Pure rate proceeding, Tennessee and its customers bear the burden

of paying for Jupiter's service of hauling Pure's condensate and other liquids from the offshore platform to the Jupiter separation plant. Jupiter believes that a modification of these arrangements is desirable and that such a modification can be accomplished with Commission cooperation. That is, the Commission can undo that which was done in the Pure settlement, and can require Pure to absorb charges related to the services performed by Jupiter respecting Pure's liquids.

Jupiter also gathers, transports, separates and puts into storage Phillips-Kerr McGee's condensate. The contracts between Jupiter and these producers do not provide a separate charge for this service but simply provide that Jupiter may retain a margin of 2.4 cents per Mcf between the price paid by Tennessee to Jupiter and the price paid by Jupiter to Phillips-Kerr McGee. The Examiner would effectively prevent Jupiter from charging Phillips-Kerr for the gathering of their condensate by requiring Jupiter to pay those producers the Commission [3343] conditioned price of 18.5 cents per Mcf, and to charge Tennessee that cost of gas plus an allocated cost of service of no more than .632 cents per Mcf. Thus, the Examiner, in effect, sets aside contractual relationships under which those producers agreed to a 2.4 cent deduction by Juiter for the varied services performed for their benefit by Jupiter. The Examiner, by treating Jupiter's charges as an "add-on" to the producer's price, instead of a deduction from the pipeline price, in effect relieves those producers from their contractual obligation to allow Jupiter compensation for non-jurisdictional services rendered for such producers.

If the Commission believes it necessary that Jupiter's charge for gathering natural gas be stated in such a manner that it can be "added on" to a regulated wellhead price of gas, Jupiter submits that a reformation of contracts is

necessary. Jupiter suggests that a conference to settle these matters would be the appropriate vehicle for the necessary and desired reformation of contracts.

IV.

REORGANIZATION OF JUPITER

When the Examiner's Decision was issued in this proceeding, it became apparent to the management of Jupiter that common stockholders and preferred stockholders had incompatible interests in the ultimate disposition of this case. Any decision which reduces Jupiter's gas gathering **[3344]** income below the level of the preferred dividend of $1.50 per share would not only deprive common stockholders of all income from the gathering system properties, but it would also leave them exposed to income tax liability associated with income payable to preferred stockholders. The preferred stockholders, of course, have a direct and immediate interest in protecting their investment to the maximum extent possible.

In order to protect all stockholders, Jupiter's Directors reached the conclusion that a new corporation should be created; that the gas gathering system and certain of the oil and gas properties owned by Jupiter should be transferred to that new company; and that the stock in such new company should be offered to preferred stockholders in exchange for their preferred stock in Jupiter and that such preferred shares should be cancelled. Under date of March 11, 1966 notice was issued to Jupiter's shareholders advising them of this proposed reorganization of the financial interests in The Jupiter Corporation.

The decision by Jupiter's Board of Directors that such a split-off proposal would be in the best interest of all of the shareholders, put Jupiter for the first time in a position

to consider the possibility of a settlement of the instant rate proceeding. Consequently, following this reorganizational decision, Jupiter's Board of Directors, which includes representatives of both common and preferred shareholders, authorized the preparation and filing of this Offer of Settlement. If a settlement of [3345] all matters before the Commission concerning Jupiter can be accomplished, a formal proposal to split-off Jupiter's Oil and Gas Division will be made to its shareholders. Assuming shareholder approval, reorganization will be accomplished by transferring assets of the Division to a new corporation, the stock of which will be distributed in redemption of the preferred stock now outstanding.

If a settlement is reached and a transfer of ownership is accomplished, the new company will, of course, make the necessary filings with the Commission seeking authority to continue the sales and services which may be subject to the Commission's jurisdiction.

V.

THE PROPOSED SETTLEMENT TERMS

Jupiter submits that the following revisions to its F.P.C. Gas Rate Schedules Nos. 7 and 8 and the following terms and conditions for the disposition of the various proceedings relating to Jupiter would be in the public interest:

1. Jupiter will file a supplement to its Rate Schedule 7 (service for Pure) providing that the total contractual charge, including the gathering or transportation of gas, condensate and liquefiable hydrocarbons, separating condensate and putting it into storage, and all other services provided by Jupiter with respect to gas, condensate and liquefiable [3346] hydrocarbons owned by Pure shall be 1.75 cents per Mcf (the present total charge is 3.4 cents per

Mcf): and providing further that of that total charge, there shall be an imputed charge of 1.25 cents per Mcf for gathering natural gas delivered to Tennessee at the Jupiter Plant.

2. Pure should be required to file a revision of its F.P.C. Gas Rate Schedule No. 40 providing that the price thereunder to Tennessee shall be the stated price plus the 1.25 cent per Mcf charge by Jupiter for gathering natural gas.

3. Jupiter will file a supplement to its F.P.C. Gas Rate Schedule No. 8 (sale to Tennessee) reducing that price from the present contract price of 22.8333 cents per Mcf to 19.75 cents per Mcf, with the provision that Jupiter will make upward or downward revisions in that price whenever, and in the amount that, the Phillips-Kerr McGee price is permitted or required by the Commission to be increased or decreased above or below the 18.5 cent per Mcf price established in Opinion No. 470.

4. Phillips and Kerr McGee shall agree to revisions of their contracts (F.P.C. Gas Rate Schedules Nos. 329 and 58, respectively) providing that Jupiter's contractual purchase price shall be the price paid by Tennessee to Jupiter less 1.5 cents per Mcf (the present margin is 2.4 cents), but that, while Phillips-Kerr McGee shall be permitted under the contract to bill Jupiter for gas sold at a price of 18.5 cents **[3347]** per Mcf, Jupiter may credit against that charge an amount of 0.25 cents per Mcf for the service of gathering and separating Phillips-Kerr McGee's condensate.

5. If Jupiter's current price of 22.8333 cents per Mcf, which was made effective December 1, 1958, had been reduced to 21.3333 cents per Mcf from December 1, 1962 (the order of investigation herein was issued December 5, 1962) until July 23, 1964 (the effective date of the Commission

order reducing Phillips Kerr McGee's rate to 18.5 cents per Mcf, and Jupiter's charge to 20.9 cents per Mcf), and to 20.9 cents per Mcf from and after July 23, 1964, Jupiter's revenues from Tennessee would have been reduced by an amount of $764,894. Jupiter is willing to and agrees to refund to such persons and on such conditions as the Commission may designate, an amount of $800,000 in order to settle all claims with respect to the legality of such past charges.

6. In the event that Pure, Phillips and Kerr McGee decline to agree to the suggested revisions of their contracts, Jupiter would nevertheless agree to make the filings described in paragraphs 1 and 3 above, provided that the Commission would accept such filings with a provision that they are not intended to affect or invalidate Jupiter's contractual rights to payment for service to those producers which are not subject to Commission jurisdiction.

[3348]

7. Jupiter will move to dismiss its appeals in *Jupiter Corporation* v. *F. P. S.*, Case Nos. 15396 and 15469 in the 7th Circuit Court of Appeals.

8. The new company referred to above (Section IV) will file a certified application and the necessary rate filings to succeed to Jupiter's present operations and to continue the sales and services rendered by Jupiter at the rates agreed upon in this settlement.

9. This Settlement Offer is contingent upon its acceptance by the Commission and its terms will become effective on that date when the Commission issues its order approving same. It is understood that Commission approval of this Offer of Settlement contemplates the issuance of an acceptable permanent certificate of public convenience and necessity to the proposed new company referred to in Sec-

tion IV *supra* as the successor to Jupiter at Docket No. G-16679.

WHEREFORE, The Jupiter Corporation requests that the Commission direct the appropriate members of its Staff to convene a Settlement Conference for the purpose of enabling the parties to review this Offer of Settlement and join in the presentation to the Commission, for its approval, of a Settlement Proposal to serve as the basis for disposition and termination of the above-entitled proceeding.

A copy of this Offer of Settlement is being forwarded to each [3349] party to these proceedings and to Union Oil Company of California successor to Pure Oil Company.

Respectfully submitted,

THE JUPITER CORPORATION
By Justin R. Wolf
Justin R. Wolf
One of Its Attorneys

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Attorneys for The Jupiter Corporation
Dated: March 28, 1966

• • • •

CAPTION

[3352]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Filed
Office of the Secretary
Federal Power Commission
April 12, 2:26 P.M. 1966

In the Matter of
THE JUPITER CORPORATION } DOCKET NO. RI63-212

RESPONSE BY PHILLIPS PETROLEUM COMPANY TO OFFER OF SETTLEMENT

Comes now Phillips Petroleum Company (Phillips), pursuant to Section 1.10 of the Commission's Rules of Practice and Procedure, and files its response to the Offer of Settlement dated March 28, 1966, and filed by The Jupiter Corporation (Jupiter) in the proceedings in Docket No. RI63-212. Phillips is a party to these proceedings by virtue of the Commission's "Order Permitting Interventions" issued December 2, 1964.

In its Opinion No. 470 and order issued August 11, 1965, in Docket Nos. G-16611, et al., the Commission issued to Phillips a certificate of public convenience and necessity authorizing the sale of natural gas to Jupiter from the

(3352)

Rollover Field at a firm rate of 18.5¢ per Mcf. Jupiter's proposed settlement would in effect reduce this firm rate to reimburse Jupiter for the non-jurisdictional service of gathering and separating the condensate contained in the gas stream.

Phillips submits that its rate of 18.5¢ per Mcf. as determined after hearings in Docket Nos. G-16611, et al., cannot be affected by a settlement of the Jupiter rate proceeding, a proceeding to which Phillips is only an intervenor party. There is therefore no reason for Phillips to revise its contract, as suggested by Jupiter, to provide for reimbursement to Jupiter for non-jurisdictional services.

[3353]

Jupiter implies in its settlement offer that Phillips is under some contractual obligation to allow it additional compensation for non-jurisdictional services (the gathering and separation of condensate) rendered for Phillips. This implication is then contradicted in the same filing by Jupiter's proposal that the contract be revised to provide for such additional compensation. However, the contract is clear and uncontradictory in this matter. Section 7(a) of said contract provides that Jupiter will perform such services "free of cost and expense to Phillips and Kerr-McGee" as a part of the total consideration received by Phillips for the dedication and sale of its gas reserves.

However, regardless of the contractual basis for Jupiter's proposal, the non-jurisdictional nature of the services performed for which Jupiter seeks additional compensation clearly renders the matter beyond the jurisdiction of the Commission. Thus, the proposed contract revision is not a

proper subject for inclusion in an offer of settlement to be approved by the Commission. The Commission is without authority to order such contract revisions and Phillips is unwilling to voluntarily agree to such revision.

Throughout this proceeding, Jupiter has attempted to establish that its function is merely that of a gatherer performing a non-jurisdictional service for Phillips and others, and that, as such, its rates for such service were not subject to Commission regulation. Jupiter has maintained that its rates were in the nature of a service charge and should be treated as a deduction from the rate approved for Phillips. This argument was rejected by the Presiding Examiner. Also, in said Opinion No. 470, the [3354] Commission found that the resolution of Jupiter's claim that it should be treated as performing a non-jurisdictional service was not necessary in the determination that Phillips was entitled to the in-line price of 18.5¢ per Mcf for its gas. Thus, it is apparent that Jupiter is here attempting by settlement offer that which it could not accomplish during the hearings —to further reduce the rate to be paid to Phillips for gas purchased under said contract.

An an intervenor party, Phillips has an interest in the disposition of the proceedings in Docket No. RI63-212. Phillips is willing to participate in the Settlement Conference sought by Jupiter insofar as such conference deals with matters which are a proper subject for adjudication in these proceedings. However, for the foregoing reasons such conference cannot include consideration of these portions of Jupiter's Offer of Settlement which would purport to affect Phillips' rates. Phillips respectfully requests that any Commission order convening a Settlement Conference clearly restrict such conference to consideration of matters

(3354)

properly before the Commission in Jupiter's docket, or in the alternative, reject the Offer of Settlement.

Dated April 11, 1966

PHILLIPS PETROLEUM COMPANY
KENNETH HEADY
JOHN R. REBMAN
STANLEY L. CUNNINGHAM
Attorneys for:
Phillips Petroleum Company
Frank Phillips Building
Bartlesville, Oklahoma
By JOHN R. REBMAN

[3355]

COUNTY OF WASHINGTON }
STATE OF OKLAHOMA } SS.

JOHN R. REBMAN, being first duly sworn deposes and says: That he is an Attorney for Phillips Petroleum Company; that as such he is familiar with the operations of Phillips Petroleum Company; that he has read the foregoing Response and that the matters and facts set forth therein are true and correct to the best of his knowledge, information and belief.

John R. Rebman

SUBSCRIBED AND SWORN TO before me, a notary public this April 11, 1966.

Bernice Houghton
Notary Public

My Commission Expires:
November 7, 1966
(SEAL)

• • • •

CAPTION

[3357]

VINSON, ELKINS, WEEMS & SEARLS
ATTORNEYS AT LAW
FIRST CITY NATIONAL BANK BUILDING
April 14, 1966
Houston 2, Texas

TELEPHONE: CAPITOL 8-9271
CABLE ADDRESS: VEWS

Hon. Joseph H. Gutride, Secretary
Federal Power Commission
441 G Street, N.W.
Washington 25, D.C.

Re: Offer of Settlement filed by The Jupiter Corporation Docket No. R163-212

Dear Mr. Gutride:

Union Oil Company of California is not a party to the captioned proceedings but was belatedly served with a copy of the Offer of Settlement filed by The Jupiter Corporation. Since Jupiter's proposal, if accepted, would materially affect the Union Oil Company of California, we feel it appropriate to give our views respecting it. Since we are not in possession of a service list, this letter is filed with an original and 19 copies.

Insofar as it would require Union's participation as outlined in the Settlement Proposal filed, Union objects and hereby states that it will not agree to contribute any sums to Jupiter for the purpose of alleviating the economic difficulties which Jupiter envisions will be encountered if the Examiner's rate recommendation is approved. We would recall to the Commission the fact that Union's Rollover sale

was initiated by The Pure Oil Company of California, and that it was the subject of extensive settlement negotiations in 1962, at the conclusion of which a settlement of Pure's 4(e) dockets was approved. Pursuant to that settlement, Pure, and now Union, has foregone through December 1965 $1,092,834.00 in revenues which would have been contractually collectible absent the settlement. Union will not volunteer further rate reductions as suggested by Jupiter. If Jupiter believes the Examiner's Decision to be incorrect, it has means by which it may make its position known. We submit that it would be neither lawful nor just for Union to bear a portion of the rate reduction which the Examiner has **[3358]** found Jupiter should bear. In view of the firmness of Union's present rates for the Rollover gas pursuant to the approved settlement agreement, Union submits that the proposed settlement negotiations should not be held.

Respectfully submitted

L. A. Gibbons
George C. Bond
Union Oil Company of California
Union Oil Center
Los Angeles, California

VINSON, ELKINS, WEEMS & SEARLS
First City National Bank Building
Houston, Texas

By John C. Snodgrass
John C. Snodgrass
Attorneys for Union Oil Company of California

* * * *

CAPTION

[3365]

BEFORE THE
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION — Docket No. RI63-212

Federal Power Commission
Docketed
April 25, 1966
Docket Section

RESPONSE OF DISTRIBUTOR INTERVENERS TO OFFER OF SETTLEMENT

By pleading filed March 28, 1966, The Jupiter Corporation has filed an offer of settlement of its pending Section 5 investigation, RI63-212, and has requested the Commission "to convene a Settlement Conference for the purpose of enabling the parties to review this Offer of Settlement". While Distributor Interveners (The Brooklyn Union Gas Company and Long Island Lighting Company) would attend a settlement conference if one were convened by the Commission, they feel that the offer submitted by Jupiter departs so markedly from a realistic solution that convening a settlement conference would probably be a waste of time and, even worse, would serve to defer still further the disposition of this long-delayed but now virtually completed Section 5 proceeding.

1. After almost unbelievable delay—engendered, as the Examiner expressly found (Examiner's Decision, p. 31), by Jupiter—this Section 5 proceeding is now ready for final decision by the Commission on Jupiter's exceptions to the Examiner's Decision. That Decison, issued January 5, 1966, would require Jupiter to reduce its presently effective rates of 3.4¢ and 3.9¢ (the latter including an amount of 1.5¢ for

(3365)

phantom tax reimburse- [3366] ment) to 0.632¢ per Mcf, and to place in escrow, pending ultimate disposition, some $3,000,000 previously collected as "tax reimbursement". Jupiter's offer proposes that its rates be fixed at 1.25¢ per Mcf, or double the Examiner's recommended level; that its refund obligation for the phantom tax reimbursement item be reduced from $3,000,000 to $800,000; and that its contracts with the producers (Phillips, Kerr-McGee, and Union, as successors to Pure Oil) be reformed to permit it to charge them separately for the transportation of liquids.

2. The settlement offer comes so late in the day that the usual benefits of settlement—avoidance of litigation and the earlier entry of a final Commission order—are absent. The litigation has already taken place, and a final Commission order can be expected at least as early absent a settlement conference as via the settlement route, even assuming a settlement could be reached. In consequence, there is very little basis for finding in the public interest any settlement which deviates to a substantial extent in Jupiter's favor from the results recommended by the Examiner and supported generally by the Commission's Staff and the Distributor Interveners.

3. For the reasons set forth in their brief to the examiner (pp. 24-27), the Distributor Interveners can find no justification, whether by settlement or otherwise, for Jupiter's retention of a single penny of the phantom tax reimbursement moneys charged, as the Examined noted (Decision, p. 50),

> "by Jupiter against its customer, Tennessee (and thus upon *their* customers down the line), for the State of Louisiana gas [3367] severance tax, but never paid over to the producers or to Louisiana or to anyone else."

Accordingly, Distributor Interveners would be forced to oppose any settlement offer which did not provide for full refunds, with interest, of these amounts or, as a very minimum, for the placing of such amounts in escrow pending resolution of their ultimate disposition. Unless Jupiter wewe willing to concede on this point at the outset, settlement negotiations would be fruitless.

4. Assuming, *arguendo*, that some deviation above the Examiner's 0.632¢ rate may be justified in order to obtain settlement, the Jupiter proposal of double the Examiner's recommended rate (which in turn is in excess of the Staff recommendation) is obviously excessive, and provides at best only a very unpromising starting point for negotiation.

5. Jupiter's proposal that the producers should be required to pay for Jupiter's transportation of the producers' liquids to the onshore processing plant does not seem inherently unfair; however, it appears to be unacceptable to the producers. Distributor Interveners reserve their position on this issue.

6. In determining whether to convene a settlement conference, the Commission should, we believe, balance the prospects for a successful settlement against the possibility of delay in ultimate disposition of these proceedings. In the present case, the settlement offer comes so late and seems to offer so little likelihood of success that we believe the Commission would be amply justified in denying Jupiter's request for a conference; this [3368] is especially true here, where relief from Jupiter's grossly excessive charges may be prospective only and Jupiter continues to collect these charges (without express refund liability) during any further delay. In the event that a settlement conference is convened, we believe that it should be set for an early date, that it should be kept in continuous session, and that the

Commission should be notified promptly if the negotiations break down, so that a final order based upon the evidence of record may be promptly entered.

Respectfully submitted,
EDWIN F. RUSSELL
Cullen and Dykman
177 Montague Street
Brooklyn, New York
Attorney for:
The Brooklyn Union Gas Company

MORTON L. SIMONS
902 Federal Bar Building
Washington, D.C.
Attorney for:
Long Island Lighting Company

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Washington, D.C., this 22nd day of April, 1966.

/s/ MORTON L. SIMONS

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CAPTION

[3370]

Filed
Office of the Secretary
May 25, 10:53 A.M. 1966
Federal Power Commission

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION } Docket Nos. RI63-212 and G-16679

AMENDED OFFER OF SETTLEMENT

The Jupiter Corporation (Jupiter), successor to Commonwealth Oil Company (formerly Marine Gathering Company), owns and operates an offshore gathering system through which it transports gas produced in the Rollover Field for delivery to Tennessee Gas Pipe Line Company (Tennessee). On December 5, 1962, the Commission initiated the investigation at Docket No. RI63-212 into Jupiter's rates, stating:

> "Jupiter under its *Rate Schedule No. 7* performs a transportation service for the Pure Oil Company (Pure) by transporting natural gas sold by Pure to Tennessee Gas Transmission Company (Tennessee) from the Rollover Field, offshore South Louisiana to Tennessee's lateral onshore. In addition to transporting the gas Jupiter gathers, distributes and separates the liquid condensates for Pure. Jupiter also performs under its *Rate Schedule No. 8* a transportation, gathering, dehydration and liquid separation service for the Phillips Petroleum Corporation (Phillips) and Kerr-McGee Oil Industries, Inc. (Kerr-McGee).

* * *

(3370)

Federal Power Commission
Docketed
May 25, 1966
Docket Section

[3371]

"Although the service furnished by Jupiter to Pure, and Phillips and Kerr-McGee are practically the same and the transportation of gas for the three companies is made through common facilities the average charge per Mcf to Pure (3.4¢) for these services exceeds that to Phillips and Kerr-McGee (2.3¢) . . . ."

Hearings were held in this proceeding during April and May, 1965 and an Examiner's Decision was issued herein on January 5, 1966. Exceptions and Replies to Exceptions were filed by various of the parties herein on February 11 and March 3, 1966. On March 28, 1966, Jupiter filed a proposed Offer of Settlement, and conferences were held with respect thereto on May 6 and May 10, 1966.

The parties participating in either or both of these conferences were Jupiter, Tennessee, Phillips, Kerr-McGee, Union Oil Company of California (successor to Pure), Long Island Lighting Co., Brooklyn Union Gas Co., Public Service Electric and Gas Co., the Pennsylvania Public Utilities Commission and the Staff of the Federal Power Commission.

I.

Basis for Settlement

As a result of those conferences, Jupiter now proposes that the proceedings at Docket Nos. RI63-212 and G-16679 be disposed of on the following bases:

(1) Jupiter will file a proposed rate schedule providing for a charge of 1.0 cents per Mcf (at 15.025 p.s.i.a.) for

transporting natural gas for Union Oil Company of California.

[3372]

(2) Jupiter will execute and file a supplement to Jupiter's Rate Schedule No. 8 providing for a contractual sale price to Tennessee of 19.5 cents per Mcf for the remaining portion of the current pricing period and for the next four (4) year price redetermination period. This contractual price shall be subject to change only in the event and to the extent that a valid action by the Federal Power Commission authorizes a price for gas sold by Phillips-Kerr McGee to Jupiter at a level different from 18.5 cents per Mcf;

(3) The effective date of these reduced rates will be May 15, 1966;

(4) Jupiter will accept a permanent certificate in Docket No. G-16679 with a condition requiring that Jupiter deposit in an escrow account an amount equal to two-thirds of the Louisiana Severance Tax reimbursement collected from Tennessee between December 1, 1958 and July 31, 1965, together with interest at 7 percent from the date of collection until the date of the Commission's order herein. At the Commission's direction Jupiter will file its corporate undertaking with respect to the establishment and maintenance of such escrow account.

It is proposed that pursuant to Commission order, Jupiter will direct distribution of the principal and accumulated interest in this escrow account either to Phillips and Kerr-McGee, in the event the Rollover Field is held to be within the taxing jurisdiction of the State of Louisiana and Phillips-Kerr McGee can establish its right thereto, or to Tennessee for distribution by it in such manner as the Commission may direct;

[3373]

(5) The offshore pipelines owned by Jupiter interconnecting Tennessee's pipeline with the offshore platforms owned by Union Oil Company of California, Phillips Petroleum Company and Kerr-McGee Industries, Inc., together with Jupiter's separation plant, will be transferred to a new company, which will file an appropriate application pursuant to Section 7(c) of the Natural Gas Act to acquire and operate these facilities and provide jurisdictional sales and services at the settlement rates herein proposed;

(6) In addition to the foregoing filings with the Commission, Jupiter will, if this Amended Offer of Settlement is accepted and approved by the Commission, move to dismiss its appeals in the United States Court of Appeals for the 7th Circuit in *Jupiter Corporation* v. *F.P.C.*, Cases Nos. 15396 and 15469;

(7) This Amended Offer of Settlement is made with the express understanding that Jupiter does not waive its rights with respect to the collection from Phillips-Kerr McGee and Union Oil Company of California of compensation for the services Jupiter performs for those producers in transporting, separating or storing those producers' condensates and liquefiable hydrocarbons. It should also be understood that this Amended Offer of Settlement is made in an effort to terminate these proceedings and the controverted matters, facts and issues herein and does not constitute a waiver by Jupier of any position it has taken or may hereafter take with respect thereto in the event this Amended Offer of Settlement is rejected by the Commission.

[3374]

II.

Cost of Service Basis for Proposed Rates

At the hearing herein, Staff presented a cost of service (Exhibits S-1, S-2 and S-3) for a hypothetical "Transportation Department" of Jupiter's Gas Gathering, Oil and Gas Division. In order to calculate this departmental cost, it was necessary for Staff to make allocations of costs incurred by Jupiter's Gas Gathering, Oil and Gas Division. Jupiter, however, took the position that its Gas Gathering, Oil and Gas Division was a single operating entity whose total cost of service should not be subdivided. Thus, at the hearing, Jupiter did not address itself in detail to the Staff's calculations. Jupiter submits that the following modifications of the Staff's cost of service, as detailed in Appendix A attached hereto, would be both permissible and appropriate and that the resulting cost of service adequately supports the proposed settlement charge of 1 cent per Mcf.

(1) *Rate of Return:* Staff used an "illustrative" 6.5 percent rate of return, although the Staff rate of return witness testified, *in his direct testimony*, that he was not recommending any rate of return because he could not calculate a cost of money for Jupiter. Jupiter submits that it would be reasonable to use an illustrative rate of return of at least 7 percent, which has been employed by the Commission in treating of other small gathering systems.

[3375]

(2) *Administrative and General Expense:* The Staff derived an administrative and general expense for its "Transportation Department" by a two-step allocation: (a) Staff allocated Jupiter's overall administrative and general cost to Jupiter's various corporate divisions on the basis of

an average of plant investment and gross revenues; (b) Staff then allocated the administrative and general expense of the Gas Gathering, Oil and Gas Division to so-called "departments" on the basis of "supervised expenses". The result of this second step allocation was to assign 85 percent of the Gas Gathering, Oil and Gas Division's administrative and general expense to operations of that Division which were already being conducted at a loss, and only 15 percent to the Division's only profitable operation—the Rollover gathering system. In the attached cost of service (Appendix A), the Staff allocation has been modified to use an average of plant investment and adjusted gross revenues in a single step allocation. The amount of administrative and general costs allocated to Jupiter's jurisdictional service as shown on Schedules 1 and 3 of Appendix A totals something less than .5 cents per Mcf transported and sold. A review of the data contained in the Commission's Publication, 1964 Statistics For Interstate Natural Gas Pipeline Companies, Sections IV and V, demonstrates that many small pipeline companies incur administrative and general expense of 1 cent per Mcf or more.

[3376]

(3) *Taxes (other)*: The Staff used net plant investment, after making several adjustments, as a basis for allocating franchise and other similar taxes to "departments". The Examiner made no adjustment of depreciation reserves which alters the Staff's allocation base. Although the amount is small, Jupiter has utilized actual per books "departmental" investment as a basis for allocating these taxes.

(4) *Rate Case Expense*: The Staff made no allowance for rate case expense whatsoever in its cost of service calculations. However, rate case expense is a proper item which is traditionally included in a cost of service. During

the years 1963-65, Jupiter paid out $273,076 for services related to its efforts to protect its rights before the Commission. The estimated expense paid or incurred during 1966 will be in excess of $27,000. Thus total regulatory Commission expense will exceed $300,000. Of this amount, it is estimated that no more than $25,000 is related to FPC matters other than the rate investigation which is the subject of Docket No. RI63-212. Therefore, Jupiter has included $55,000 as an allowance for the amortization of $275,000 of rate case expense over a 5-year period.

(5) *Allowance for Exploration and Development Expense:* The Staff made no allowance for any portion of Jupiter's Exploration and Development expense of $662,347 to be recouped from "pipeline" operations. **[3377]** The Commission has generally made some reasonable allowance for such cost in pipeline costs of service. Nevertheless, in the illustrative cost of service attached hereto, Jupiter has omitted any allowance for exploration and development expense from its jurisdictional cost of service.

(6) *Volumes for Derivation of Rate:* The test year of 1962 employed in the Staff's cost of service represented a point close to maximum production from the Rollover Field. In the following year, 1963, volumes transported by Jupiter fell off sharply and subsequently have increased somewhat. The average volume sold to Tennessee and transported for Pure (Union of California) in the three years 1963-65 was 49,407,490 Mcf, and that volume has been utilized in Appendix A in the calculation of Jupiter's revenues at the proposed settlement rates.

Summary

Attached hereto as Appendix A is a summary of the Staff's cost of service as adjusted herein. That cost of serv-

ice develops a unit cost of 1.16 cents per Mcf as compared with the proposed settlement charge of 1.0 cent per Mcf.

Jupiter submits that the settlement charge of 1.0 cent per Mcf proposed herein is fully justified by reference to such cost of service calculations, even without consideration of the many other issues which will be resolved by its acceptance.

[3378]

III.

The Severance Tax Issue

On November 6, 1958, Commonwealth Oil Company, a predecessor to Jupiter, commenced calling gas to Tennessee at the initial price of 22.0833 cents per Mcf (base price of 21.3333 cents, plus 0.75 cents gathering tax reimbursement). A certificate application was filed at Docket No. G-16679 for authority to make that sale. Effective December 1, 1958, the State of Louisiana revoked its gathering tax and increased its gas severance tax from 0.3 cents to 2.3 cents per Mcf: Phillips-Kerr McGee then filed to increase their price to Commonwealth: and Commonwealth filed to increase its price to Tennessee to 22.8333 cents per Mcf. The Commission did not suspend either the Phillips-Kerr McGee or the Commonwealth rate increase filings; it expressly permitted them to become effective as of December 1, 1958.

The Commission issued a temporary certificate to Commonwealth in the proceeding at Docket No. G-16679 requiring Commonwealth to refund the Louisiana Gathering Tax to Tennessee, in the event that tax was held unconstitutional.* No similar condition was attached with [3379]

* An amount of $8,921.46 was collected from Tennessee during the period November 6-30, 1958 on account of this Gathering Tax. Jupiter will refund that collection to Tennessee.

reference to the collection of reimbursement for the Severance Tax which became effective December 1, 1958.

It should be noted that commencing December 1, 1958, Jupiter was entitled to collect its total rate of 22.8333 cents per Mcf, without reference to the severance tax reimbursement provisions of its contract. Section 9(d) of Jupiter's contract with Tennessee (Jupiter's Rate Schedule No. 8) is a "favored nations" provision entitling Jupiter to the highest total price paid by Tennessee in the designated pricing area. Tennessee was paying 22.8333 cents per Mcf effective December 1, 1958 to other producers, including Phillips for the purchase of gas produced from the Hog Bayou Field. Consequently, as of December 1, 1958, Jupiter was entitled to collect a rate of 22.8333 cents per Mcf without reference to severance tax liability or reimbursement.

During the rate investigation at Docket No. RI63-212 the propriety of the collection of this rate was put in question, and the Examiner proposed an order that Jupiter be required to establish a reserve account on its books for possible liability to refund the full amount of the 1.5 cent severance tax reimbursement multiplied by the volumes sold since December 1, 1958, to which the Louisiana Severance Tax might have been applicable. Attached hereto as Appendix B is a tabulation identifying the volumes sold since the commencement of sale to Tennessee on November 6, 1958 and the amount which may be considered as gathering and severance tax reimbursement.

[3380]

Because it is imperative that a corporate reorganization of Jupiter proceed at the earliest possible date (See Section IV, *infra*), and because that reorganization requires the termination of all questions respecting Jupiter's rates and charges which may be subject to the jurisdiction of the

Federal Power Commission. Jupiter is willing to deposit in an escrow account two-thirds of the so-called severance tax reimbursement collected from Tennessee, together with interest at the rate of 7 percent per annum from the date of collection until the date of a Commission order accepting this proposed settlement.

Assuming that the Commission issues an order on June 15, 1966 approving this Amended Offer of Settlement, the fund to be created would be $1,320,731 plus $281,567 interest, totaling $1,602,298. Neither Jupiter, nor the new corporation to be organized, is or will be in a financial position to deposit such an amount immediately in an escrow account. It is proposed that Jupiter establish the escrow account by immediately depositing an amount of $252,298 and thereafter Jupiter will deposit $27,000 per month for a peroid of fifty months. The total amount in the escrow account, including accumulated interest, will be held for ultimate distribution to Tennessee or Phillips-Kerr-McGee, as the Commission ultimately may order. It is recognized, of course, that final disposition of the escrow account must necessarily await final resolution of the question of the location of the Rollover Field as respects Federal and State boundaries.

[3381]

IV.

Reorganization of Jupiter

The Examiner's Decision in this proceeding created a potential conflict of interest between Jupiter's common stockholders and preferred stockholders. The preferred stock is currently entitled to an aggregate dividend of $840,000, if earned; the common stockholders are also subject to income tax liability associated with this aggregate

payment. Thus, any final order reducing Jupiter's gas gathering income below the $840,000 aggregate dividend plus the income tax associated therewith — or a total amount of approximately $1,200,000 — would deprive the common stockholders of all income from the gathering system properties and additionally leave these common stockholders exposed to an income tax liability for such dividends as would be required to be paid to the preferred stockholders. Thus, the lower the income of the gas gathering division, the lower the dividend payable to the preferred but the lower the income tax liability which must be borne by the common stockholders.

In order to protect all stockholders, Jupiter's Directors decided that a new corporation should be created; that the gas gathering system, certain of the oil and gas producing properties and all undeveloped leases owned by Jupiter should be transferred to that new company; and that the **[3382]** stock in such new company should be distributed to the preferred stockholders in redemption of their preferred stock in Jupiter.

The reorganization will be accomplished by transferring assets of Jupiter's present Gas Gathering, Oil and Gas Division to a new, wholly-owned subsidiary corporation. This transfer will be accompanied by the filing of a certificate application by that new corporation for authority under Section 7(c) of the Natural Gas Act to acquire facilities and to transport and sell gas at the settlement charge of 1 cent per Mcf set forth herein.

Promptly after the transfer of properties to the new corporation has been authorized, Jupiter will solicit shareholder approval of the reorganization described above. It is imperative, both for the proxy statement to be filed with the Securities and Exchange Commission and for the benefit and understanding of preferred stockholders, that the

income position of the new company be stabilized, and uncertainty eliminated to the greatest degree possible. These objectives will be accomplished by the issuance of a permanent certificate to Jupiter at Docket No. G-16679 conditioned as proposed herein, the creation of the new company referred to above and the issuance to that new company of a new certificate authorizing it to acquire Jupiter's pertinent jurisdictional facilities and services.

V.

Conclusion

The instant Section 5(a) proceeding at Docket No. RI63-212, the [3383] certificate proceeding at Docket No. G-16679 and the judicial review proceedings now pending in the United States Court of Appeals for the Seventh Circuit together raise a number of complex legal and factual issues. No one can accurately forecast how each or all of these issues will ultimately be resolved. But until they are resolved there can be no certainty with respect to the amount of money Tennessee — and its customers — will have to pay for the approximate 50 billion cubic feet of gas purchased annually from the Rollover Field.

A resolution of the instant proceedings on the basis of the Amended Settlement Offer made herein will serve to resolve all controversial issues and will put an end to uncertainty respecting Tennessee's cost of gas purchased in the Rollover Field. The settlement rates proposed herein would represent a reduction in Tennessee's cost of purchased gas of over $1,000,000 per year. The establishment of an escrow account with respect to the collections made on account of the Louisiana Severance Tax will create a finite, indentifiable fund available for ultimate distribution as the Commission may eventually order. And resolution of these proceedings on the basis of the instant

Amended Offer of Settlement will be in the best interest of Jupiter's stockholders in that those stockholders will thus be able to achieve a certainty respecting future income, albeit at a level significantly lower than that currently experienced.

[3384]

Jupiter submits that the instant Amended Offer of Settlement will avoid uncertainty, will eliminate the occasion for further expensive and time consuming litigation and strikes a fair balance between the consumer and investor interests involved. Jupiter urges the Commission to give prompt and favorable consideration to this Amended Offer of Settlement.

Finally, in order to expedite the Commission's resolution of this matter, Jupiter is simultaneously serving a copy of this Amended Offer of Settlement on Union Oil Company of California (Pure) and on all parties herein and Jupiter respectfully requests that those parties file their comments with respect hereto on or before June 8, 1966.

Respectfully submitted,

THE JUPITER CORPORATION
By /s/ JUSTIN R. WOLF
Justin R. Wolf
One of Its Attorneys

HOWARD R. KOVEN
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1625 K. Street, N. W.
Washington, D. C. 20006

Attorneys for The Jupiter Corporation

Dated: May 25, 1966

[3385]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of Section 1.17 of the Rules of Practice and Procedure and upon:

Mr. C. E. Smith
Manager, Gas Department
Union Oil Company of California
Union Oil Center
Los Angeles, California 90017

Mr. John C. Snodgrass
Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston, Texas 77002

Dated at Washington, D. C., this 25th day of May, 1966.

(Signed) JUSTIN R. WOLF
Justin R. Wolf

Of Counsel for
The Jupiter Corporation

APPENDIX A

Schedule 1

THE JUPITER CORPORATION
Docket No. RI63-212

SUMMARY OF COSTS AND REVENUES

Gathering System Cost of Service	Total	Costs Charged to Jurisdictional Service (See Sch. 2)
Operating Expenses (Ex. S-1, Sch. 1)	$ 68,351	$ 66,493
Administrative and General (Sch. 3)	245,107	238,445
Depreciation (Ex. S-1, Sch. 1)	67,616	65,778
Amortization of Commonwealth Cost of Acquiring Marine Gathering Co. Ex. S-1, Sch. 1)	142,626	—
Exploration and Development Expense (Sch. 6)	662,347	—
Taxes (Other) (Sch. 7)	12,485	12,146
Return at 7 percent ($1,173,130 investment)	82,119	79,887
Federal Income Tax	58,908	57,307
Rate Case Expense (Sch. 5)	55,000	55,000
Total Jurisdictional Cost of Service (Excluding Cost of Purchased Gas)	—	575,056
Average Unit Cost per Mcf		1.16c/Mcf
Revenues from proposed Settlement Charge using 1963-5 average volumes (Sch. 4)		494,075
Proposed Settlement Charge		1.0c/Mcf

[3387]

Schedule 2

THE JUPITER CORPORATION

Docket No. RI63-212

BASIS FOR ALLOCATION OF GATHERING SYSTEM COSTS

	Volumes (Staff Ex. S-2, Sch. 4)	Percent
Sales of Gas		
Jurisdictional to Tennessee	19,118,237	36.075
Non-jurisdictional to Phillips	1,166,845	2.202
Transportation		
Total gas for Pure	32,437,199	61.207
Condensate for PKM and Pure	273,571	0.516
Total Volumes	52,995,852	100.000
Summary		
Jurisdictional service	51,555,436	97.282
Non-jurisdictional service	1,440,416	2.718
Total Gathering System Service	52,995,852	100.000

Notes:

Rate case expense charged directly to jurisdictional service.

All other joint gathering system costs allocated on volumetric basis using Staff volumes shown in Exhibit S-2, Schedule 4.

Schedule 3

THE JUPITER CORPORATION
Docket No. RI63-212
ALLOCATION OF ADMINISTRATIVE
AND GENERAL EXPENSE

	Total	Gathering	Production	Barge
(1) Adjusted Gross Revenue	$5,051,783	$4,514,781	$ 471,416	$ 65,586
(2) (Percent)	100.0	89.370	9.332	1.298
(3) Supervised Expenses (Ex. S-1, Sch. 2)	447,398	68,351	356,792	22,255
(4) Total Expenses	$5,650,184	$4,021,104	$1,550,460	$ 78,617
(5) Gross Plant per Books (Ex. S-1, Sch. 6A)	8,435,527	2,392,106	5,273,846	769,575
(6) (Percent)	100.0	28.357	62.520	9.123
(7) Average Gross Revenue and Gross Plant Percentages	100.0	58.863	35.926	5.211
(8) Administrative and General Expenses (Ex. S-1, Sch. 2) (Adjusted to reflect effect of reduced revenues upon allocation base)	$ 416,402	$ 245,107	$ 149,597	$ 21,698

Staff allocated A&G costs in proportion to Supervised Expenses, assigning 15 percent to the gathering system and 85 percent to the production and barge operations. The gathering operation was the only function providing net income to Jupiter. The barge was leased out under a "bare boat" charter; it was not recovering expenses. The production operations were conducted at a substantial loss.

An allocation of administrative and general expenses to functions in proportion to an average of gross revenues and gross plant is consistent with the method developed by Staff in Exhibit S-1, Schedule 2-A, to allocate Jupiter's administrative costs to Divisions. Gross Revenues for 1962 have been reduced $1,255,268 to reflect the proposed settlement rates.

Schedule 4

THE JUPITER CORPORATION
Docket No. RI63-212

SUMMARY OF ANNUAL VOLUME OF GAS DELIVERED FROM ROLLOVER FIELD OFFSHORE LOUISIANA

	Phillips Kerr-McGee	Union Oil Company	Total
1959	20,756,259	32,306,394	53,062,653
1960	20,689,293	33,051,859	53,741,152
1961	20,049,647	32,060,639	52,110,286
1962	20,285,082	32,437,199	52,722,281
1963	19,643,016	28,015,318	47,658,334
1964	19,637,048	30,272,031	49,909,079
1965	20,350,948	30,304,109	50,655,057
Average 1963-5	19,877,004	29,530,486	49,407,490

REVENUES AT SETTLEMENT RATES

	Transportation of Gas
Phillips-Kerr McGee	
Volume	19,877,004
Charge	1.0¢
Revenue	$ 198,770
Union Oil of California	
Volume	29,530,486
Charge	1.0¢
Revenue	$ 295,305
Total Revenue	$ 494,075

Schedule 5

THE JUPITER CORPORATION

Docket No. RI63-212

ANALYSIS OF RATE CASE EXPENSE

	Legal and Professional Fees	Travel and Miscellaneous Expense	Total
1963	$ 32,628	$ 478	$ 33,106
1964	77,207	392	77,599
1965	158,063	4,308	162,371
1966	(Estimated)		27,000
		Total	$300,076

Estimated charges related to certificate and general matters	$ 25,000
Estimated Rate Case Expense	275,076
Amortization over 5 year period	55,000

Schedule 6

THE JUPITER CORPORATION

Docket No. RI63-212

PRODUCTION, EXPLORATION AND DEVELOPMENT EXPENSE

Exploration and Development Expenses (Ex. S-3, p. 3)		
Dry Hole Costs	$ 64,087	
Delay Rentals	37,467	
Surrendered Leases	409,039	
Abandonments	86,353	
Geological Expenses	65,401	
Total		$ 662,347
Production Expense		
Production, Operating Expense (Ex. S-3, Sch. 3)	$ 31,843	
Land and Legal Expenses (Ex. S-3, Sch. 3)	50,854	
Lease Operating Expenses (Ex. S-3, Sch. 3)	237,751	
Production Taxes (Ex. S-3, Sch. 3)	29,296	
Overhead Allocated (Ex. S-3, Sch. 3)	(4,760)	
Total Operating Expense		$ 348,984
Depreciation, Depletion and Amortization (Ex. S-1, Sch. 3)		$ 389,532
Administrative and General (Sch. 3)		149,597
Total Production, Exploration and Development Expenses		$1,550,460
Revenues from Production (Ex. S-3, p. 3)		471,416
Profit or (Loss) from Production Department		($1,079,044)

Schedule 7

THE JUPITER CORPORATION

Docket No. RI63-212

TOTAL OF FRANCHISE, STATE INCOME AND AD VALOREM TAXES ALLOCATED TO FUNCTIONS IN PROPORTION TO GROSS INVESTMENT PER BOOKS

Gross Investment Per Books
(Ex. S-1, Page 1)

	Gathering System	Production
Total Plant and Intangible Investment	$3,690,368	$5,273,846
Percent	41.1678	58.8322

Allocation of Taxes

	Total	Gathering	Production
Ad Valorem and Franchise	$30,327	$12,485	$17,842
Production	—	—	29,296
Total	$59,623	$12,485	$47,138

APPENDIX B

Sheet 1

THE JUPITER CORPORATION
ANALYSIS OF GATHERING AND
SEVERANCE TAX REIMBURSEMENT
COLLECTED FROM
TENNESSEE GAS PIPE LINE COMPANY

	Volume	Amount
Gathering Tax		
November 6 through November 30, 1958	1,189,528	$ 8,921.46
Severance Tax		
December, 1958	1,446,648	$ 21,699.72
1959, calendar year	20,811,466	312,171.92
1960, calendar year	20,640,182	310,352.77
1961, calendar year	20,048,604	300,729.09
1962, calendar year	19,770,268	296,554.01
1963, calendar year	18,820,410	282,306.17
1964, calendar year	18,914,373	283,715.64
1965, January 1 through July 31	11,571,126	173,566.90
Total Severance Tax	132,073,077	$1,981,096.27
Two-thirds of Total		$1,320,730.80

APPENDIX B
Sheet 2

THE JUPITER CORPORATION

COMPUTATION OF INTEREST AT RATE OF 7% PER ANNUM THROUGH JUNE 15, 1966 ON TWO-THIRDS OF SEVERANCE TAX COLLECTED

	Total Tax Collected	Date Received	No. of Days For Interest Calculation	Decimal Interest Factor at 7%	Interest at 7%
January 20-31, 1961	$ 10,161.75	2-27-61	1,934	.3079412	$ 3,769.41
February, 1961	22,060.56	3-27-61	1,906	.3655708	8,064.70
March, 1961	27,536.82	4-25-61	1,906	.3600086	9,713.49
April, 1961	25,271.90	5-24-61	1,848	.3544464	8,957.53
May, 1961	25,776.17	6-23-61	1,818	.3486924	8,987.95
June, 1961	24,704.13	7-24-61	1,787	.3427466	8,467.26
July, 1961	26,662.71	8-25-61	1,755	.3366090	8,974.91
August, 1961	26,046.39	9-26-61	1,723	.3304714	8,607.59
September, 1961	20,896.05	10-24-61	1,695	.3251010	6,793.33
October, 1961	26,366.21	11-27-61	1,661	.3185798	8,399.74
November, 1961	25,649.15	12-22-61	1,636	.3137848	8,048.31
December, 1961	23,456.24	1-25-62	1,602	.3072636	7,207.25
January, 1962	25,954.32	2-26-62	1,570	.3011260	7,815.52
February, 1962	23,790.63	3-26-62	1,542	.2957556	7,036.21
March, 1962	26,091.96	4-26-62	1,511	.2898098	7,561.71
April, 1962	25,129.77	5-28-62	1,479	.2836722	7,128.63
May, 1962	25,778.75	6-27-62	1,449	.2779182	7,164.38
June, 1962	24,702.60	7-25-62	1,421	.2725478	6,732.64
July, 1962	25,004.84	8-24-62	1,391	.2667938	6,671.14
August, 1962	24,170.67	8-25-62	1,359	.2606562	6,300.23
September, 1962	23,517.41	10-26-62	1,328	.2547104	5,990.13
October, 1962	24,398.81	11-28-62	1,295	.2483810	6,060.20
November, 1962	23,708.76	12-27-62	1,266	.2428188	5,756.93
December, 1962	24,305.49	1-28-63	1,234	.2366812	5,752.65
January, 1963	24,345.60	3- 1-63	1,202	.2305436	5,612.72
February, 1963	21,695.93	4- 1-63	1,171	.2245978	4,872.86
March, 1963	25,244.49	4-29-63	1,143	.2192274	5,534.32
April, 1963	23,482.38	5-29-63	1,113	.2134734	5,012.86
May, 1963	25,017.86	7- 1-63	1,080	.2071440	5,182.30
June, 1963	23,801.50	7-25-63	1,056	.2025408	4,830.77

APPENDIX B

Sheet 3

THE JUPITER CORPORATION

COMPUTATION OF INTEREST AT 7% PER ANNUM THROUGH JUNE 15, 1966 ON TWO-THIRDS OF SEVERANCE TAX COLLECTED

	Total Tax Collected	Date Received	No. of Days For Interest Calculation	Decimal Interest Factor at 7%	Interest at 7%
July, 1963	21,704.61	8-30-63	1,020	.1956360	4,246.20
August, 1963 ..	21,645.35	9-27-63	992	.1902656	4,118.37
September, 1963	20,208.95	10-28-63	961	.1843198	3,724.91
October, 1963 ..	23,343.12	11-29-63	929	.1781822	4,159.33
November, 1963	25,133.00	12-31-63	897	.1720446	4,324.00
December, 1963	26,683.38	1-28-64	869	.1666742	4,447.43
January, 1964 ..	25,927.13	2-27-64	839	.1609203	4,172.20
February, 1964	24,193.37	4- 3-64	803	.1540154	3,726.15
March, 1964	24,891.54	4-24-64	782	.1499876	3,733.42
April, 1964	24,125.04	5-26-64	750	.1438500	3,470.39
May, 1964	25,284.83	7- 1-64	714	.1369452	3,462.64
June, 1964	22,590.71	8- 7-64	677	.1298486	2,933.37
July, 1964	23,117.52	8-25-64	659	.1263962	2,921.97
August, 1964	23,138.39	9-28-64	625	.1198750	2,773.71
September, 1964	22,582.13	10-29-64	594	.1139292	2,572.76
October, 1964 ..	20,489.93	12- 4-64	558	.1070244	2,192.92
November, 1964	23,472.14	12-29-64	533	.1022294	2,399.54
December, 1964	23,902.91	1-29-65	502	.0962836	2,301.46
January, 1965 ..	24,554.43	2-26-65	474	.0909132	2,232.32
February, 1965	23,542.67	3-31-65	441	.0845838	1,991.33
March, 1965	27,077.70	4-30-65	411	.0788298	2,134.53
April, 1965	24,381.48	5-26-65	385	.0738430	1,800.40
May, 1965	25,096.26	6-29-65	351	.0673218	1,689.53
June, 1965	24,031.52	8- 2-65	317	.0608006	1,461.13
July 1 through July 31, 1965	24,882.84	8-30-65	289	.0554302	1,379.26
	$1,320,730.80				$281,566.89

CAPTION

[3397]

VINSON, ELKINS, WEEMS & SEARLS
Attorneys at Law
First City National Bank Building
Houston 2, Texas

Telephone: CApitol 8-9271
Cable Address: VEWS

June 1, 1966

Honorable Joseph H. Gutride
Secretary
Federal Power Commission
441 G Street N.W.
Washington, D.C. 20426

RE: In the Matter of The Jupiter Corporation OAO
Docket Nos. RI63-212, et al

Dear Mr. Gutride:

In our letter of April 14, 1966 we outlined the position of Union Oil Company of California respecting the first offer of settlement filed by The Jupiter Corporation. Jupiter has now filed an amended settlement offer. Although the amounts of the proposed rate reduction and refund have been changed, Union's position respecting such proposal is unaltered and remains the same as stated in our said letter of April 14, 1966.

Respectfully submitted,

L. A. Gibbons
George C. Bond
UNION OIL COMPANY OF
CALIFORNIA
Union Oil Center
Los Angeles, California 90017

VINSON, ELKINS, WEEMS & SEARLS
First City National Bank Bldg.
Houston, Texas 77002

By JOHN C. SNODGRASS
John C. Snodgrass
ATTORNEYS FOR UNION OIL COMPANY OF CALIFORNIA

• • • •

CAPTION

[3400]

KM

KERR-McGEE CORPORATION
Kerr-McGee Building Oklahoma City, Oklahoma 73102

June 6, 1966

Lynn Adams
Vice President and General Counsel

Honorable Joseph H. Gutride
Secretary, Federal Power Commission
441 "G" Street, N.W.
Washington, D.C. 20426

Re: In the Matter of The Jupiter Corporation
Docket No. RI63-212

Dear Mr. Gutride:

The Jupiter Corporation filed an Offer of Settlement in the captioned matter, to which Kerr-McGee Corporation filed its Response under date of April 14, 1966.

The Jupiter Corporation has now filed an Amended Offer of Settlement, and although the amounts of proposed rate reduction and refund have been materially changed, Kerr-

McGee's position respecting such Amended Offer of Settlement is fully set forth and asserted in its Response to the original Offer of Settlement of The Jupiter Corporation, which position is restated and reasserted herein.

Respectfully submitted,

KERR-McGEE
CORPORATION

By LYNN ADAMS
Lynn Adams
Vice President
and General Counsel

• • • •

CAPTION

[3402]

PHILLIPS 66

PHILLIPS PETROLEUM COMPANY
Bartlesville, Oklahoma 74003

June 6, 1966

Honorable Joseph H. Gutride
Secretary
Federal Power Commission
441 G Street N.W.
Washington, D.C.

Re: Docket No. RI63-212

Dear Sir:

In reference to the amended offer of settlement filed by The Jupiter Corporation in this docket, please be advised that the position of Phillips Petroleum Company has not

changed since its response to Jupiter's offer of settlement filed March 28, 1966.

Very truly yours,

s/ STANLEY L. CUNNINGHAM
Stanley L. Cunningham
Attorney

SLC:pr
cc: Abraham R. Spalter
All Parties on Service List

* * * *

CAPTION

[3405]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman;
L. J. O'Connor, Jr., Charles R. Ross,
David S. Black and Carl E. Pagge.

THE JUPITER CORPORATION } Docket Nos. RI63-212, CP65-58, and G-16679

ORDER APPROVING RATE SETTLEMENT, PRESCRIBING REFUNDS, ISSUING CERTIFICATE AND TERMINATING PROCEEDINGS

(Issued June 28, 1966)

The Jupiter Corporation (Jupiter), on May 25, 1966, filed an amended offer of settlement in Docket Nos. RI63-212, and G-16679.[1] The proceeding in Docket No. RI63-212 was

[1] Jupiter's initial offer of settlement, filed March 28, 1966, was the subject of settlement conferences which resulted in the filing of its amended offer.

initiated pursuant to Section 5 of the Natural Gas Act.[2] and involves an investigation of the rates and charges of Jupiter for the transportation and sale of natural gas in the Rollover Field, South Louisiana. Jupiter transports gas produced by the Union Oil Company of California (Union) (successor to Pure Oil Company) from Union's offshore Rollover Platform to an onshore line owned by Tennessee Gas Pipeline Company (Tennessee)[3] which purchases the gas from Union. Jupiter also purchases gas from the Phillips Petroleum Company and Kerr-McGee Corporation (Phillips-Kerr-McGee) at their offshore platforms and transports it on-shore where it sells and delivers it to Tennessee.[4] Jupiter currently charges 3.4¢ per Mcf for transporting gas from Union and retains from its selling price to Tenessee, 2.4¢ per Mcf over and above the price it pays to Phillips-Kerr-McGee.

Docket No. G-16679 involves an application by Jupiter for a permanent certificate of public convenience and necessity for authority to sell and deliver to Tennessee the gas which it purchases from Phillips-Kerr-McGee in the Rollover Field. Jupiter currently makes such sale under a temporary certificate issued May 24, 1962, as amended by Commission Opinion No. 470 and order, issued August 11, 1965.[5]

Docket No. CP65-58, which was consolidated with Docket No. RI63-212,[6] involves a certificate application of Tennessee for authority to lease and operate at a cost of $1,200,000

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[2] By order issued December 5, 1962.
[3] Jupiter's FPC Rate Schedule No. 7.
[4] Jupiter's FPC Rate Schedule No. 8.
[5] This amendment conditioned the temporary certificate to a price of 20.9¢ per Mcf as of July 23, 1964.
[6] Order issued October 30, 1964.

annually, the offshore facilities in the Rollover Field and related onshore facilities now owned and operated by Jupiter.

The Examiner, in his initial decision in Docket No. RI63-212, *et al.*, issued January 5, 1966, found a just and reasonable transportaation rate of .632¢ per Mcf based upon an annual cost of service of $334,859. The Examiner in lieu of providing a unit rate, prescribed a monthly charge equal to one-twelfth of the cost of service. The Examiner denied Tennessee's certificate application in Docket No. CP65-58, principally for the reason that the proposed annual rental fee was approximately four times the cost of service. Exceptions to the Examiner's decision were filed by Jupiter, Tennessee, the staff and certain of the interveners.

Jupiter's amended offer of settlement in summary proposes as follows:

(1) Jupiter will file a proposed rate schedule providing for a charge of 1.0¢ per Mcf (at 15.025 psia) for transporting gas for Union; (2) Jupiter will execute and file a supplement to its Rate Schedule No. 8 providing for a contractual sale price to Tennessee of 19.5¢ per Mcf for the remaining portion of the current pricing period and for the next four year price redetermination period; (3) the effective date of these reduced rates will be May 15, 1966; (4) Jupiter will accept a permanent certificate in Docket No. G-16679 with a condition requiring that Jupiter deposit in an escrow account an amount equal to two-thirds of the Louisiana Severance Tax reimbursement collected from Tennessee between December 1, 1958 and July 31, 1965, together with interest at 7 percent from the date of collection until the date of the Commission's order herein, it is estimated that such escrow amount will total $1,602,298.

Jupiter also states that the 19.5 cents per Mcf contractual price to Tennessee would be subject to change only in the event and to the extent that a valid action by the Federal Power Commission authorizes a price for gas sold by Phillips-Kerr-McGee at a level different from 18.5¢ per Mcf.

Jupiter further represents that the offshore pipelines owned by Jupiter interconnecting Tennessee's pipeline with the offshore platforms owned by Union Oil Company of California, Phillips Petroleum Company and Kerr-McGee Industries, Inc. together with Jupiter's separation plant, will be transferred to a new company, which will file an appropriate application pursuant **[3407]** to Section 7(c) of the Natural Gas Act to acquire and operate these facilities and provide jurisdictional sales and services at the settlement rates herein proposed. [Jupiter makes its amended offer with an express understanding that Jupiter does not waive its rights with respect to the collection from Phillips-Kerr-McGee and Union of compensation for services Jupiter performs in transporting, separating or storing those producers' condensates and liquefiable hydrocarbons. Jupiter further states that if its amended offer of settlement is accepted and approved by the Commission, it will move to dismiss its appeal in the U.S. Court of Appeals for the 7th Circuit in *Jupiter Corporation* v. *F.P.C.*, Cases Nos. 15396 and 15469.[7]]

None of the customers-interveners of Tennessee nor the intervening state commissions oppose the settlement offer. Union, and Phillips-Kerr-McGee state that they do not

[7] Since the filing of the amended offer, the Court of Appeals, Seventh Circuit, on June 8, 1966, (Case No. 15396), denied Jupiter's petition to review the Commission's order denying Jupiter's petition to intervene in the South Louisiana area rate proceeding, Docket AR61-2. Jupiter's other appeal is from the Commission's amendment of its temporary certificate in Opin. 470.

intend to negotiate their contracts with Jupiter to reimburse Jupiter for transporting, separating or storing the producers' condensate and liquefiable hydrocarbons, alleging that this service is nonjurisdictional and not properly a part of Jupiter's settlement. Tennessee does not oppose the offer, but states that its position is without prejudice to its rates under its settlement agreement in Docket Nos. G-11980, G-17166, and G-19983.

Jupiter shows that its proposed settlement rate of 1.0¢ per Mcf would produce annual revenues of $494,075 based upon average volumes of gas transported over the three year period 1963-1965. It claims an annual jurisdictional cost of service of $575,056 which is $240,197 over and above the Examiner's cost of service. This claimed increase is due primarily to the use by Jupiter of allocations of costs to functions, different from those used by the staff and the Examiner.

While we are not here passing upon the validity of the Examiner's cost of service we note that Jupiter's proposed 1.0¢ settlement rate produces annual revenues of $159,216 in excess of the Examiner's cost of service. However, a consideration of the benefits which a settlement can effectuate militates against our outright rejection of the proposed settlement rate on this ground alone.

The proposed settlement would accomplish the following: A reduction in Jupiters' transportation rate of approximately 65 percent which would effect an immediate reduction in Tennessee's purchased gas costs of over $1,000,000 annually without further litigation; establishment of a firm transportation rate of 1.0¢ per Mcf; immediate settlement of the Louisiana severance tax issue; termination of all pending rate and certificate proceedings and court appeals involving Jupiter; realization of the maximum benefits to consumers through establishment of

the lowest transportation rate, at which Jupiter claims its stockholders will be protected from severe financial loss and under which Jupiter can be preserved as an operating entity.

[3408]

Having weighed these factors together with our consideration of the relationship of the revenues at the proposed settlement rate to the Examiner's cost of service, referred to above, we are of the opinion that, taken in its entirety, Jupiter's amended offer of settlement is in the public interest and should be approved. Our approval, however, does not constitute, nor should it be considered, an acceptance of or agreement with Jupiter's adjustments to the Examiner's cost of service or the allocation methods employed by Jupiter or any of the other factors which form the basis for Jupiter's adjustments.

Our approval of Jupiter's offer is without prejudice to any future investigation or consideration by the Commission of any or all of Jupiter's jurisdictional rates and charges. Thus we do not include as part of the settlement we are approving here, Jupiter's reservation that its proposed 19.5c per Mcf contractual price to Tennessee shall be subject to change only in the event and to the extent that the Commission validly authorizes a price for gas sold by Phillips-Kerr McGee to Jupiter at a level different from 18.5 cents per Mcf.

Our approval of Jupiter's settlement offer will terminate the proceeding in Docket No. RI63-212. We will affirm the Examiner's denial of Tennessee's certificate application in Docket No. CP65-58. Tennessee has indicated that it does not oppose the settlement offer. The annual lease fee proposed in the latter docket is almost 2½ times Tennessee's purchase gas costs at the settlement rate.

In Opinion No. 470, we amended Jupiter's temporary certificate in Docket No. G-16679. We shall in this order issue a permanent certificate to Jupiter in that docket with a condition requiring Jupiter to establish an escrow account as proposed in its amended offer. In addition, any amounts Jupiter receives from Phillips-Kerr-McGee, by way of refund as a result of the reduction in Phillips-Kerr McGee's in-line price in the Rollover Field, as ordered in Opinion 470, in Docket Nos. G-16611 and G-16718, shall be included in the escrow account.[*] The accounts placed in escrow shall be subject to further orders in Docket No. G-16679 directing disposition to the party or parties entitled thereto.

Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips-Kerr McGee of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons and the producers answers on that point does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission.

The Commission finds:

(1) The settlement of the proceedings in Docket Nos. RI63-212, CP65-58, and G-16679 on the basis set forth in Jupiter's amended offer of settlement filed May 25, 1966, as above described, is reasonable and proper in the public interest in carrying out the provisions of the Natural Gas Act, and such proposed settlement should be approved and

[*] We note that Jupiter, in its initial brief in Docket Nos. G-13221, *et al.*, filed September 30, 1964, agreed to flow through or to refund to Tennessee any rate reductions or refunds it receives from Phillips-Kerr McGee resulting from Jupiter's operations in the Rollover Field.

made effective, subject to the terms and conditions hereinafter provided and ordered.

(2) The proposed settlement rate of 1.0¢ per Mcf should become effective May 15, 1966, and Jupiter should make appropriate filings with the Commission to reflect the reduced rate effective as of that date, subject to the approval of the Commission.

(3) It is reasonable and proper and in the public interest that a permanent certificate of public convenience and necessity be issued to Jupiter in Docket No. G-16679, subject to the conditions as hereinafter ordered.

(4) In view of this settlement, it is necessary and appropriate in the public interest and in carrying out the provisions of the Natural Gas Act that the proceedings in Docket No. RI63-212 and Docket No. G-16679 be terminated and that the Examiner's decision in Docket No. CP65-58 be affirmed.

The Commission orders:

(A) The settlement of these proceedings on the basis of the terms contained in the settlement offer as above-described is approved and Jupiter shall make the necessary filings to reflect the reduced transportation rate of 1.0¢ per Mcf, to be effective May 15, 1966, subject to the terms and conditions as hereinafter ordered.

(B) A permanent certificate of public convenience and necessity is issued to Jupiter in Docket No. G-16679, subject to Jupiter's placing in an escrow account, an amount equal to $\frac{2}{3}$ of the Louisiana severance tax reimbursement collected from Tennessee between December 1, 1958, and July 31, 1965, together with interest at 7 percent from the date of collection until the date of the Commission's order herein; and an amount equal to the refunds which Jupiter

receives from Phillips-Kerr-McGee, as a result of the Commission's establishment in Opinion No. 470 of an in-line price for Phillips-Kerr-McGee.

[3410]

(C) Jupiter shall establish an escrow account relating to the Louisiana severance tax immediately depositing an amount of $252,298 and monthly deposits of $27,000 for a period of fifty months. Jupiter shall also deposit in such escrow account all amounts received or to be received as a result of our Opinion No. 470.

(D) The amounts deposited in the escrow account, together with accumulated interest thereon shall be retained subject to further order in Docket No. G-16679 directing disposition to the party or parties entitled thereto.

(E) Within 15 days of the date of this order Jupiter shall file appropriate revisions to its FPC Gas Rate Schedules, reflecting the rate reductions herein approved and ordered, subject to the Commission's acceptance thereof.

(F) Upon compliance by Jupiter with the terms of this order, and subject to the disposition of the amounts referred to in paragraphs (C) and (D) above, the proceedings in Docket Nos. RI63-212, G-16679 and CP65-58 will be terminated.

(G) This order is without prejudice to any future investigation or consideration of Jupiter's rates and charges, which the Commission may hereinafter order.

(H) This order is without prejudice to any findings or orders which have been or may hereinafter be made by the Commission and is without prejudice to any claims or contentions which may be made by the Commission, Jupiter, the Commission Staff, or any other party affected by this order, in any proceeding now pending or hereafter insti-

tuted by or against Jupiter or any other persons or parties affected by this order.

By the Commission.

(SEAL)

Joseph H. Gutride,
Secretary,

CAPTION

[3410.1]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of THE JUPITER CORPORATION	Docket No. RI63-212

CHANGE IN RATE SCHEDULE NO. 8

Seller:	The Jupiter Corporation
Buyer:	Tennessee Gas Pipeline Company, a Division of Tenneco Inc.
Field:	Rollover Field, Offshore Vermilion Parish, Louisiana
Proposed Rate:	19.5 cents per Mcf at a pressure base of 15.025 psia.
Proposed Effective Date:	May 15, 1966
Basis for Change:	The proposed rate is hereby filed in compliance with the Commission's Order in this proceeding issued June 28, 1966 approving rate settlement proposals.

THE JUPITER CORPORATION
By G. Burton Liese
Senior Vice President

July 13, 1966

[3410.2]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of THE JUPITER CORPORATION	Docket No. RI63-212

CHANGE IN RATE SCHEDULE NO. 7

Transporter:	The Jupiter Corporation
Shipper:	Union Oil Company of California
Field:	Rollover Field, Offshore Vermilion Parish, Louisiana
Proposed Rate:	One cent (1.0¢) per Mcf at a pressure base of 15.025 psia for natural gas delivered to Tennessee Gas Pipeline Company, a Division of Tenneco Inc. for the account of Union Oil Company of California
Proposed Effective Date:	May 15, 1966
Basis for Change:	The proposed rate for the transportation of natural gas is hereby filed in compliance with the Commission's Order in this proceeding issued June 28, 1966 approving rate settlement proposals.

THE JUPITER CORPORATION
By G. Burton Liese
G. Burton Liese
Senior Vice President

July 13, 1966

CAPTION

[3411]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION — Docket Nos. RI63-212, CP65-58, and G-16679

APPLICATION BY PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR REHEARING OF ORDER APPROVING RATE SETTLEMENT, PRESCRIBING REFUNDS, ISSUING CERTIFICATE AND TERMINATING PROCEEDNGS

Comes now Phillips Petroleum Company (Phillips) and Kerr-McGee Corporation (Kerr-McGee) and file this their application for rehearing of the Commission's Order in the above proceeding issued June 28, 1966, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Rules of Practice and Procedure of the Federal Power Commission. Phillips and Kerr-McGee (hereafter jointly referred to as Phillips-Kerr-McGee) are parties to the proceedings by virtue of the Commission's "Order Permitting Interventions" issued December 2, 1964, and are aggrieved by the aforesaid Order of the Commission in the respects hereinafter set out. In support of the within application for rehearing Phillips-Kerr-McGee would respectfully show as follows:

• • • •

states generally that settlement on the basis of the amended offer "is reasonable and proper in the public interest . . . and such proposed settlement should be approved and made effective," subject to terms and conditions thereafter provided which do not advert to point (5) of the offer.

I

The Commission's Order errs in failing to specify that Jupiter's claimed rights for compensation for services to Phillips-Kerr-McGee are not involved in the proceedings to be settled and have already been finally disposed of.

In the word of the provision of the Order at the top of its page 5, quoted *supra*, dealing with Jupiter's attempted reservation of claimed rights, there appears to be an ambiguity which renders the Order of questionable validity.

It will be noted that the claimed rights, as stated in point (7) of the amended offer of settlement, relate solely (save for those having to do with Union Oil) to alleged rights to compensation "for the services Jupiter performs" for Phillips-Kerr-McGee. The *only* such services are the separation of the condensates transported by Jupiter onshore with the gas and the delivery thereof back to Phillips-Kerr-McGee "free of cost and expense to Phillips and Kerr-Megee."

By no stretch of imagination could any question of compensation respecting such "services" be involved in Dockets Nos. RI63-212 and G-16679 which are those here under consideration. [3417] The only compensation to Jupiter, insofar as Phillips-KerrMcGee gas is concerned, in either of these dockets is the price that Jupiter is to receive from Tennessee, involved in Jupiter's Rate Schedule No. 8.

The terms of the relationship between Jupiter and Phillips-Kerr-McGee were involved in the proceedings disposed of by Opinion No. 470. In those proceedings the treatment of the condensate "free of cost and expense to Phillips and Kerr-McGee" was not questioned in any way by Jupiter or by the Commission, although the terms of the relationship were fully disclosed and dealt with in the record. No question relating to the condensate transportation issue can be raised at this late date.

In point of fact, the 18.5¢ per Mcf "in-line" price determined in Opinion No. 470 for the Phillips-Kerr-McGee sale had its genesis in an earlier proceeding where condensates were transported by the purchaser, free of charge to the producer. In Opinion No. 436, it was pointed out that the 18.5¢ per Mcf level had been found "in-line" in three prior cases (32 FPC 254, 260). The earlier of those three cases was second *CATCO*, 27 FPC 96. In that proceeding, the "in-line" price of 18.5¢ per Mcf was established and in that case the purchaser, Tennessee, transported condensates to shore for the CATCO producers (27 FPC [3418] 104). The Examiner's opinion reveals that such condensate transportation was free of charge to the producers (27 FPC 115, 119) where the condensate production was greater than here. (27 FPC 150; CATCO production was 7.9 bbls per Mmcf whereas Phillips-Kerr-McGee production is only 5.8 bbls per Mmcf (Ex. 2, Sched. 4)).

We are confident that the Commission's treatment of Jupiter's so-called "reservation" of claimed rights was not intended to erode in any way that state of the record. And in the sense that the matter has been disposed of, as we have stated, the first sentence in the passage of the Order at the top of its page 5 is quite literally correct. But the second sentence is so worded as to seem to imply something that could not have been contemplated: that there

remains open for negotiation between the parties some new contractual "arrangements" respecting Jupiter's "services" in its handling of the condensates for Phillips-Kerr-McGee. If that is implied, the Commission, it is submitted, has plainly erred. There is already a firm contractual arrangement covering the matter — that entered into between Phillips-Kerr-McGee and Jupiter's predecessor, assumed by Jupiter, and still in force.

It is requested that the Commission strike the second sentence lest it simply breed further controversy and litigation that would be a waste of time for all concerned, including not **[3419]** least of all this Commission.

II

The Commission errs in failing to make clear its disposition of point (5) in the amended offer of settlement and of the issues presented thereby.

Point (5) of the amended offer seems to include, as an integral part of the offer, a proposal that a new corporation be formed to take over the pipeline operation. The Order makes no disposition of this point unless its finding (1) were to be construed as an approval of this proposal. If that finding is not intended as an approval, and if the Order is intended to approve a settlement without any commitment on the part of the Commission as to the proposal for a new corporation, the Order should make that clear both in the interest of fairness and in the interest of avoiding future misunderstanding and possible further controversy and litigation.

It is submitted that in no event could the Order, in its finding (1) or otherwise, approve point (5) of the amended offer. The Commission cannot anticipate, on this record, whether it would approve a transfer of assets and certifi-

cation of a new company; such a proposal, under the Act, would require a new evidentiary record with the opportunity for all interested parties to participate in the resulting proceedings.

• • • •

CAPTION

[3440]

BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of THE JUPITER CORPORATION THE PURE OIL COMPANY,[1] ET AL.	Docket Nos. RI63-212, et al. Docket Nos. G-16790, et al.

PETITION OF
TENNESSEE GAS PIPELINE COMPANY,
A DIVISION OF TENNECO INC.,
FOR AN ORDER DIRECTING
JUPITER CORPORATION
AND UNION OIL COMPANY OF CALIFORNIA
TO COMPLY WITH COMMISSION ORDERS
IN THE ABOVE PROCEEDINGS

Pursuant to Section 16 of the Natural Gas Act, as amended, and the Commission's Rules of Practice and Procedure, Tennessee Gas Pipeline Company (Tennessee), a Division of Tenneco Inc., hereby requests the Commission to issue an order or orders in the above proceedings directing Jupiter Corporation (Jupiter) to charge for the transportation of gas delivered to Tennessee for the account of Union Oil Company of California (Union), successor in interest to The Pure Oil Company, from the Rollover Field,

---

[1] Union Oil Company of California is now successor in interest to The Pure Oil Company.

Offshore Vermilion Parish, Louisiana no more than one cent (1¢) per Mcf, in accordance with its FPC Gas Rate Schedule No. 7, as supplemented, pursuant to the settlement approved by the Commission order issued June 28, 1966 and directing Union to comply with the provisions of "Order Approving Rate Settlement Proposal, as amended, Prescribing Refunds, Severing and Terminating Proceedings" issued November 27, 1962. In support hereof, Tennessee respectfully submits the following:

[3441]

(1)

The exact legal name of Tennessee is Tennessee Gas Pipeline Company, a Division of Tenneco Inc. Tenneco Inc. is a corporation organized and existing under the laws of the State of Delaware. The location of Tennessee's principal place of business is the Tennessee Building, Houston, Texas. The names, titles and mailing addresses of the persons to whom communications concerning this petition are to be addressed are as follows:

W. C. Braden, Jr., General Attorney
Roy C. Alletag, Attorney
Tennessee Gas Pipeline Company,
A Division of Tenneco Inc.
P. O. Box 2511
Houston, Texas 77001

Robert E. Shaw, Attorney
402 Solar Building
Washington, D. C. 20036

Tennessee is a natural gas transmission company principally engaged in the business of producing, purchasing, transporting and selling natural gas in interstate commerce, under authorization granted by and subject to the

jurisdiction of the Federal Power Commission. Tennessee's main transmission system extends in a northeasterly direction from the sources of supply in Texas and Louisiana through the States of Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New York, New Jersey, Massachusetts, New Hampshire, Rhode Island, and Connecticut.

(2)

Tennessee is presently purchasing natural gas produced by Union in the Rollover Field, Offshore Vermilion Parish, Louisiana pursuant to a contract originally with The Pure Oil Company (Pure) dated March 16, 1950. **[3442]** Under a settlement agreement approved by the Commission by order issued November 27, 1962 in Docket No. G-16790, *et al.*, while the sale here involved was still being made by Pure, Pure had proposed, with respect to the gas sold to Tennessee (page 3, *mimeo ed.*),

> "a settlement rate of 16.75c per Mcf plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for *the transportation of the gas onshore*, and to make any necessary filing in the future to reflect any change that may be made therein." (Emphasis supplied)

Pure's FPC Gas Rate Schedule No. 40, as amended by Supplement No. 9, to comply with the above-described settlement agreement, provides "The price to be paid * * * for all gas delivered to * * * Buyer * * * shall be the sum of (a) and (b) below:

> "(a) * * *
>
> "(b) The average payment in cents per Mcf paid to The Jupiter Corporation by The Pure Oil Company for gas transported, which shall be determined monthly

> by dividing the total payment made by The Pure Oil Company to The Jupiter Corporation by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4c) per Mcf for the first sixty-two thousand, five hundred (62,500) Mcf per day and three cents (3c) per Mcf on additional volumes."

Pure's interest in the above contract was acquired by Union in July, 1965 and by Commission order dated January 20, 1966, Pure's FPC Gas Rate Schedule No. 40, described above, was renumbered Union's FPC Gas Rate Schedule No. 120.

(3)

Prior to the issuance of the Commission order on June 28, 1966, in the instant docket, Jupiter's FPC Gas Rate Schedule No. 7, under which **[3443]** Jupiter transported gas produced by Union from the Rollover Field, provided a rate of approximately 3.4c per Mcf for the transportation of such gas. However, by order issued June 28, 1966, the Commission accepted an amended settlement proposal of Jupiter that its transportation charge for gas transported from the Rollover Field to Tennessee's system for the account of Union be reduced to one cent (1.0c) per Mcf. In said June 28, 1966 order, the Commission noted that Jupiter "currently charges 3.4c per Mcf for transporting gas for Union * * *" (*mimeo*, p. 1), and stated that "Jupiter will file a proposed rate schedule providing for a charge of 1.0c per Mcf (at 15.025 psia) for transporting gas for Union * * *." In this connection, the Commission also pointed out that the proposed settlement would accomplish, *inter alia*, (1) "a reduction in Jupiter's transportation rate of approximately 65 percent which would effect an immediate reduction in Tennessee's purchased gas costs of over $1,000,000

annually without further litigation" and (2) "establishment of a firm transportation rate of 1.0¢ per Mcf" (*mimeo*, p. 3).

(4)

Pursuant to said order of June 28, 1966, Jupiter, on July 13, 1966, filed a change in rate to its FPC Gas Rate Schedule No. 7 reducing to one cent (1.0¢) per Mcf the transportation charge for natural gas delivered to Tennessee for the account of Union from the Rollover Field effective May 15, 1966. The Commission accepted this change in rate by letter dated August 15, 1966.

[3444]

(5)

Based on information and belief, it is Tennessee's understanding that despite the foregoing, Jupiter has not complied with said order but has continued to charge Union an average rate of approximately 3.4¢ per Mcf under its said FPC Gas Rate Schedule No. 7 for transportation of the gas from the Rollover Field. Union in turn has sought to charge Tennessee an average rate of 3.4¢ per Mcf, stating in its invoice by way of explanation that "Transportation charge shown above represents actual rate paid to Jupiter for gas delivered during the month involved." A copy of a typical invoice submitted by Union to Tennessee is attached as an Appendix hereto.

WHEREFORE, to implement the clear terms and purposes of the above settlements and orders and reflect lawful charges under Jupiter's Rate Schedule No. 7, Tennessee respectfully requests that the Commission issue an order or orders directing Jupiter to charge for gas transported from the Rollover Field, Offshore Vermilion Parish, Louisiana for the account of Union since May 15, 1966 no more than the one cent (1.0¢) rate provided in Jupiter's

FPC Gas Rate Schedule No. 7 as revised pursuant [3445] to the Jupiter settlement approved by Commission order issued June 28, 1966 and directing Union to charge Tennessee no more than 1.0¢ per Mcf for the transportation of gas pursuant to Union's FPC Gas Rate Schedule No. 120, as supplemented, and for such other and further relief as may be appropriate.

Respectfully submitted,

TENNESSEE GAS PIPELINE COMPANY,

A DIVISION OF TENNECO INC.

s/ Roy C. Alletag
Roy C. Alletag
Attorney

W. C. Braden, Jr.
Roy C. Alletag
P. O. Box 2511
Houston, Texas 77001

Attorneys for
Tennessee Gas Pipeline Company,
A Division of Tenneco Inc.

May 31, 1967

[3447]

CONFORMED COPY
INVOICE
UNION OIL OF CALIFORNIA
800 Prudential Building
HOUSTON, TEXAS 77025

DATE March 17, 1967

Tennessee Gas Pipeline Company
P. O. Box 2511
Houston, Texas 77001

We charge you for gas deliveries during January, 1967 from Rollover through Jupiter's Lake Arthur Station Cameron Parish, Louisiana:

**Jupiter Transportation Charge	96,445.87	3.377632	
Mcf Tenn. Gas Trans. Contr. Quan.	2,855,429		
Plus Base Price		16.75c	
Total		20.127632	
*2,804,213 Mcf @ 15.025 @ 20.127632			$564,421.67

Mcf @ 15.025

2,858,692 per Union Meters
1,897,025 per Phillips Meters
4,755,717 Total per Field Meters
4,750,288 Total as Tailgate Jupiter Plant

$$\frac{2,858,692}{4,755,717} \times 4,750,288 = 2,855,429$$

Less Plant Shrinkage 51,216

Gross Del. to Tenn. Gas 2,804,213

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* Above column volume computed as follows:

** Transportation charge shown above represents actual rate paid to Jupiter for gas delivered during the month involved.

* * * *

CAPTION

[3451]

UNITED STATE OF AMERICA
FEDERAL POWER COMMISSION

In the Matters of THE JUPITER CORPORATION THE PURE OIL COMPANY,[1] *et al.*	Docket Nos. RI63-212, *et al.* G-16790, *et al.*

ANSWER OF UNION OIL COMPANY OF CALIFORNIA TO PETITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., FOR AN ORDER DIRECTING THE JUPITER CORPORATION AND UNION OIL COMPANY OF CALIFORNIA TO COMPLY WITH COMMISSION ORDERS IN THE ABOVE PROCEEDING

COMES NOW, Union Oil Company of California (Union), pursuant to Section 1.9 of the Commission's Rules of Practice and Procedure, and answers the Petition filed by Tennessee Gas Pipeline Company, a division of Tenneco Inc. (Tennessee) for an order directing The Jupiter Corporation (Jupiter) and Union to comply with Commission orders in the above proceedings.

As and for its answer, Union states as follows:

I

Except as to such allegations as are hereinafter specifically admitted, Union denies each and every material allegation set forth in Tennessee's Petition.

II

Union, successor in interest to The Pure Oil Company (Pure)

* * * *

[1] Union Oil Company of California succeeded to the interest of The Pure Oil Company on July 16, 1965.

relationships with Jupiter and with Tennessee are quite different from those of Union. Apparently such producers sell their gas to Jupiter at the offshore platform, and the services by Jupiter of separation of the condensates transported with gas then owned by Jupiter for redelivery back to such producers onshore are performed "free of cost and expense to Phillips and Kerr-McGee." (page 6, Application for Rehearing). It is further stated by these producers that the only compensation to Jupiter for this service is the price that Jupiter is to receive from Tennessee under Jupiter's Rate Schedule No. 8. Such is not the case with Union in its separate contractual relationships with Jupiter and Tennessee although, it is submitted, the end result is the same as a result of Tennessee's reimbursement of this out-of-pocket expense to Union.

In response to the application for rehearing referred to above, the Commission issued its order clarifying its prior order and denying rehearing on August 22, 1966, and therein stated as follows (page 1, memo ed.) concerning Jupiter's reservation and the Commission's earlier response thereto:

> "Phillips-Kerr-McGee state that the quoted sentence seems to imply that there are contractual "arrangements" between Jupiter and the producers (Phillips-Kerr-McGee and Union Oil Company of California) which remain open for negotiation. They contend that if that is implied, the Commission has erred because the firm contractual arrangement entered into by the parties with respect to such transportation is still in force.
>
> "The quoted sentence neither implies that further contractual arrangements are open for negotiation nor requires that further negotiations be held. That sentence merely indicates that we are not now determining the claimed rights of any party on this matter.

Accordingly, it is our view that the Phillips-Kerr-McGee request that we strike the quoted sentence from our order should be denied."

On November 14, 1966, Union received Jupiter's first post-settlement [3461] invoice using the rate of 1.0¢ per Mcf and purporting to be tendered per the terms of Union's Hydrocarbon Gathering and Separating Agreement. In view of the reservation made by Jupiter purporting to enable it to charge Union separately for services rendered under the Hydrocarbon Gathering and Separating Agreement relating to condensate and liquid hydrocarbons, and failing to receive oral clarification from Jupiter as to its intentions in this regard, Union, by letter to Jupiter dated November 23, 1966, returned Jupiter's invoice and stated, in part, as follows:

"If it is now the desire of Jupiter to modify Section 7 of the aforementioned Hydrocarbon Gathering and Separating Agreement to provide for the flat rate of 1 cent per Mcf as used per your invoice No. 2729, we would be happy to entertain a proposed amendment to this agreement by which this rate is substituted in lieu of the compensation rates now set forth in Section 7."

In response to Union's letter of November 23, 1966, Jupiter by letter dated December 6, 1966, responded by submitting two invoices and stating as follows in regards thereto:

"* * * The first (invoice) covers the transportation of gas and, pursuant to our FPC Gas Rate Schedule No. 7, Supplement No. 5, the amount invoiced on this item is calculated on the basis of \$0.01 per MCF of gas transported at 15.025 PSIA.

"The second covers all other services provided for in our Agreement except transportation of gas and compression. This second invoice is calculated on the basis

of the difference between (a) $0.01 per MCF of gas transported and (b) the rates of compensation set forth in Section 7 of our Agreement covering all services to be rendered by us under said Agreement, including the transportation of gas."

By letter dated December 12, 1966, Union returned Jupiter's two invoices and stated as follows, in pertinent part:

"It was not our intent nor the purpose of our recent **[3462]** letter to solicit from Jupiter the two in lieu invoices, in each of which you have used "rates of compensation" not provided for in our agreement. Section 7 of the agreement sets forth the rate of compensation to be applied to the volumes indicated therein and this single rate, although expressed in terms of "cents per Mcf," is the compensation provided in our agreement for services rendered in connection with "both" gas and condensate delivered to you under the agreement.

"While we do not object to any allocation of the total compensation rate that Jupiter may elect to make for its internal or non-contractual purposes, Union cannot affirm such allocation when submitted by invoice or invoices purporting to be made pursuant to its agreement with Jupiter. It would be equally unacceptable to Union to pay an invoice on which any such extra-contractual allocation is noted or referenced. Therefore, we request that Jupiter resubmit its revised invoice showing the compensation rate set forth in Section 7 of the agreement applied to the applicable volume for the period covered. Upon receipt of such resubmitted invoice, we will promptly remit our check in payment thereof.

"Your invoices No. 2729 and No. 2729-A are returned to you herewith."

Finally, on January 20, 1967, Jupiter submitted invoices for separate months and used the total compensation rates set forth in the Hydrocarbon Gathering and Separating Agreement dated January 2, 1957. These invoices, and similar invoices tendered prior to the time of the filing of Tennessee's Petition in this matter, have been duly paid by Union.

Upon payment of Jupiter's invoices as referred to above, Union tendered its supplemental invoices to Tennessee for reimbursement of these payments pursuant to the filed rate established under Union's FPC Gas Rate Schedule No. 120. Tennessee has refused to pay any of these invoices tendered by Union.

V.

As set forth herein, Union is entitled to full reimbursement from [3463] Tennessee for all payments made to Jupiter under its Hydrocarbon Gathering and Separating Agreement, and such reimbursement is an integral part of Union's approved rate on file with the Commission in its FPC Gas Rate Schedule No. 120. Union's relationship with Jupiter and Tennessee regarding such payments is that of a conduit, and this was the clear intention of these parties as well as the Commission in all matters relating to this sale to Tennessee. It is submitted that Tennessee is in error in looking to the "filed effective rate" under Jupiter's FPC Gas Rate Schedule No. 7 (to which it is not privy), rather than to Union's "filed effective rate" established by the Pure Settlement and now the approved rate under Union's FPC Gas Rate Schedule No. 120, in assessing the magnitude of the rate to be paid to Union for gas delivered to Tennessee under said rate schedule.

It is submitted that both contractually and pursuant to the "filed rate doctrine" Tennessee is obligated to reim-

burse Union in full for all payments made by Union to Jupiter under Section 7 of the Hydrocarbon Gathering and Separating Agreement. That Agreement provides for a single payment for all services, and Tennessee has no more right to tender Union reimbursement for only a portion than does Jupiter to invoice Union separately for so-called jurisdictional and non-jurisdictional services.

In its settlement proposal which the Commission approved, Union agreed to accept the role of a conduit and thus disassociate itself economically from any change in Jupiter's charges. It cannot and will not permit that role to be altered.

It is thus Union's position that if the Commission declines to fix the full compensation recoverable from it by Jupiter and Jupiter continues **[3464]** to bill Union for the 3.4¢ per Mcf (approximate) rate set forth in Section 7 of the Hydrocarbon Gathering and Separating Agreement. Tennessee has an obligation under its contract with Union and under Union's filed rate to reimburse Union for the full 3.4¢ per Mcf.

Because of the filing of Tennessee's Petition and its refusal to honor Union's invoices, Union has temporarily suspended all payments to Jupiter in order to give the Commission an opportunity to act to resolve the problem without further enlargement of the sums in dispute.

Union's position is that its settlement agreement may not be legally abrogated. Tennessee must pay Union in accordance with the latter's field rate irrespective of any filings made by Jupiter from whom Tennessee does not purchase Union's gas.

Having discussed the legal aspects of the controversy, we should like to comment briefly on the equities involved.

It is clear from a review of the examiner's decision and the Commissions' order approving the Jupiter settlement at Docket No. RI63-212 that the rate ordered was based upon cost-of-service considerations in which no allocation of so-called jurisdictional and non-jurisdictional services and costs were made. It is equally apparent that the examiner and the Commission could not justify Jupiter's charges, yet the Commission did noting to require Jupiter to reduce its charges to Union nor to permit Jupiter to make a segregation of jurisdictional from non-jurisdictional services.

As the order approving Pure's settlement shows, Pure's Rate Schedule No. 40 (Union's Rate Schedule No. 120) was recast to reduce Pure's Rollover price to 16.75¢ per Mcf plus charges actually paid Jupiter. Thus Pure was [3465] financially unconcerned with any future change in the Jupiter charges. Any reductions would automatically flow through to Tennessee and Pure's rate would be unaffected. Whatever may have been the Commission's intent, Jupiter declines to accept a reduction in revenues but apparently desires that Union or Tennessee absorb the portion of Jupiter's rate which is in excess of one cent per Mcf.

Perhaps because the Commission felt such a controversy would never arise, the problem created by Jupiters' attempted "reservation of rights" was not decided when raised by Phillips and Kerr-McGee on petition for rehearing of the order approving Jupiter's settlement. If the problem was speculative and inchoate, then it certainly is no longer. It could be resolved by appropriate findings of the Commission with an order requiring Jupiter to amend Section 7 of the Hydrocarbon Gathering and Separating Agreement and to file a rate schedule amendment providing for a rate per Mcf for *all* services performed under

Jupiter's Rate Schedule No. 7, and directing Tennessee to pay Union's filed rate which would continue to include whatever rate Jupiter charges Union for such services.

In view of the facts set forth herein, it is respectfully submitted that the relief sought by Tennessee in its Petition is erroneously conceived as being a complete and final solution to the "problems" presented. Should the Commission issue an order "directing Jupiter to charge for *gas* transported from the Rollover Field * * * for the account of Union since May 15, 1966 no more than one cent (1.0¢) rate provided in Jupiter's FPC Gas Rate Schedule No. 7 as revised pursuant to the Jupiter settlement approved by the Commission's order issued June 28, 1966" (Petition, pages 5 and 6), the situation would be precisely the same as it is now in that it is Jupiter's claimed right to charge for *services not relating to "gas"* and the right of Union to receive from [3466] Tennessee full reimbursement of the total charges made by Jupiter that is in issue. If, coupled with such an order directed to Jupiter, Union should be required to reduce its filed rate below that amount which would result in *full* reimbursement for *all* payments made by Union to Jupiter, such requirement by the Commission would, in effect, be a reduction in Union's settlement rate previously approved by the Commission.

In the absence of such an order, Tennessee must reimburse Union for the full 3.4¢ per Mcf (approximately) which Jupiter is invoicing for services under Section 7 of the Hydrocarbon Gathering and Separating Agreement.

Therefore, Union respectfully urges that the Commission deny the requests of Tennessee as set forth in its Petition and that it direct Tennessee to reimburse the amounts invoiced by Union which reflect Union's actual payments to Jupiter and which are reimbursable to Union as an integral

part of its effective rate on file with the Commission in Union's FPC Gas Rate Schedule No. 120, as supplemented.

Respectfully submitted,

UNION OIL COMPANY
OF CALIFORNIA

Orig. Signed By
George C. Bond
George C. Bond
Assistant Counsel

L. A. Gibbons
George C. Bond
Henry B. Eubank
Union Oil Company of California
Union Oil Center
Los Angeles, California 90017

John C. Snodgrass
Vinson, Elkins, Weems & Searls
First City National Bank Building
Houston, Texas

Attorneys for Union Oil Company
of California

• • • •

CAPTION

[3470]

BEFORE THE
FEDERAL POWER COMMISSION

In the Matters of THE JUPITER CORPORATION THE PURE OIL COMPANY,[1] ET AL	Docket Nos. RI63-212, et al. Docket Nos. G-16790, et al.

RESPONSE OF THE JUPITER CORPORATION TO PETITION OF TENNESSEE GAS PIPELINE COMPANY

The Jupiter Corporation (Jupiter), in response to the Petition of Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) For An Order Directing Jupiter Corporation and Union Oil Company of California To Comply With Commission Orders in the Above Proceedings, filed on June 1, 1967, by Tennessee, hereby states that it believes that Tennessee's request for relief, insofar as it related to *Jupiter's* billing and collection practices and policies, is superfluous, since Jupiter's practices and policies are already consistent with the request of Tennessee. In further explanation thereof, Jupiter states:

1. On June 26, 1967, the Commission approved settlement of Jupiter's rate proceedings in Docket No. RI63-212. That settlement provides, inter alia, that Jupiter's rate to Union Oil Company of California (Union), for Jupiter's service of gathering Union's *natural gas* offshore, and delivering it [3471] onshore to Tennessee, shall be 1¢ per Mcf. The underlying promise of said settlement is that such handling *of natural* gas is a jurisdictional service.

---

[1] Union Oil Company of California is now successor in interest to The Pure Oil Company.

2. Jupiter has made it clear to Union that Jupiter is billing Union at the rate of 1¢ per Mcf of *natural gas* received from Union and delivered to Tennessee.

Jupiter's total billings to Union are at the contractual rate of approximately 3.4¢. But Jupiter has also made it clear to Union that only 1¢ per Mcf is charged, and chargeable, relative to natural gas; that Jupiter performs clearly non-jurisdictional services for Union; and that while the settlement of Jupiter's rate case has not altered Union's total contractual obligations to pay the full contractual rate of approximately 3.4¢ for the total service performed by Jupiter for Union, said settlement has limited the charge which Jupiter can make for jurisdictional natural gas service to 1¢ per Mcf.

Specifically, Jupiter billed Union, for the month of October, 1966, by use of one invoice (attachment A) at the rate of 1¢, stated as being "for transportation of gas from the Rollover Field . . ." and a second invoice (attachment A, page 2) at the rate of 2.4¢, stated as being "for services rendered, other than transportation of gas. The services to [3472] which this invoice applies includes the gathering of condensate and the separating of condensate from gas and the performing of all other services provided for under our agreement . . ." Those invoices were accompanied by a letter, dated December 6, 1966, from Jupiter, which set forth the fact that one invoice covered "the transportation of gas", while the other "covers all other services provided for in our agreement". (Exhibit B). (This was done after Union had sent back, with cover letter (attachment C), a 1¢ invoice (attachment D) of Jupiter on the grounds it did not conform to the proper contractual charge.) Union then rejected the separate 1¢ and 2.4¢ invoices, by letter dated December 12, 1966, which stated that Union would pay

Jupiter the full contractual charge if Jupiter would put its billing in the form of one invoice (attachment E).

Jupiter then billed Union for the months of October, 1966 (and for the months of November and December, 1966) in one invoice, for each month, computed at the rate of 3.4¢ per Mcf (attachment F), and has done so since. Union paid such invoice and paid each such invoice of Jupiter thereafter until the billings for the months of April and May, 1967, which invoices are unpaid.

Jupiter accompanied its 3.4¢ invoices for the months of October, November and December, 1966, with a letter (attachment G) in which Union was informed that Jupiter would "continue [3473] its billing to Union, relative to the contract of January 2, 1957 between the corporate predecessors of those corporations, in the form of one invoice", pursuant to Union's request in its letter of December 12, 1966. At the same time, Jupiter also sent to Union a copy of the Commission's order approving the settlement of Jupiter's rate case, with a letter calling such order to Union's attention. (attachment H)

3. Jupiter, until receipt of Tennessee's Petition herein, was not informed as to the level of Union's billing to Tennessee or of Tennessee's payments to Union.

4. The Tennessee Petition herein raises not only the request that Jupiter should charge only 1¢ per Mcf for the gas of Union which it carries (which Jupiter is now charging), but also that Union should charge Tennessee, in total, 1¢ per Mcf. This latter request raises questions of interpretation of the Commission's order in Union's own rate settlement, in Docket No. G-16790, et al. including the question of whether the Commission intended to, or, indeed, could, order and authorize Union's predecessor to collect for non-jurisdictional services which Union receives rela-

tive to the condensate owned by Union and carried for Union by Jupiter.

Union's Answer filed herein, its letters to Jupiter [3474] (see attachments hereto) and its payment of Jupiter's invoices, shows that Union recognizes that it is contractually obligated to pay Jupiter a charge which averages approximately 3.4¢ per Mcf. Union suggests, at page 15 of its Answer, that the Commission could enter "an order requiring Jupiter to amend Section 7 of the Hydrocarbon Gathering and Separating Agreement and to file a rate schedule amendment providing for a rate per Mcf for *all* services performed under Jupiter's Rate Schedule No. 7." Over and above the fact that such a suggestion, if followed, would involve the Commission in an effort to set the level of compensation for non-jurisdictional services, Union's suggestion is also confusing because the referred to "Hydrocarbon" contract between Jupiter and Union *already* set a rate for *all* services. What the Commission's order in Jupiter's rate proceeding has done is to act upon the portion of those services under that contract which the Commission found to be jurisdictional (the carrying of gas), and to specify the level of charge which may be collected for such jurisdictional service.

Union itself recognizes the fatal flaw in its "suggestion," because Union does not go on to request such an order. Instead, Union requests that Tennessee reimburse Union for "Union's actual payments to Jupiter," presumably including the charge for the delivery of Union's condensates, etc.

[3475]

WHEREFORE, in view of the foregoing, Jupiter submits that the Petition of Tennessee be denied, insofar as it pertains to Jupiter and requests that Jupiter be directed "to charge for gas transported from the Rollover Field,

Offshore Vermilion Parish, Louisiana for the account of Union since May 1, 1966, no more than the one cent (1.0c) rate provided in Jupiter's FPC Gas Rate Schedule No. 7 as revised pursuant to the Jupiter Settlement", on the basis that Jupiter has already been so ordered by this Commission, and has complied and is complying with such order. The remainder of Tennessee's request for relief, Jupiter submits, seems to properly raise for Commission consideration and decision, the indicated question of interpretation of the terms of Union's rate settlement: that is, whether Union's charge to Tennessee is to be based on the full level of Jupiter's contractual charge for services to Union, or only upon the portion charged for the carrying of the natural gas which Tennessee receives.

Respectfully submitted,

THE JUPITER CORPORATION

/s/ Howard R. Koven
Howard R. Koven
Vice President and General Counsel
Suite 1130
208 South LaSalle Street
Chicago, Illinois

/s/ William W. Brackett
William W. Brackett
Room 1900
122 South Michigan Avenue
Chicago, Illinois

June 28, 1967

• • • •

Attachment A

[3478]

INVOICE

THE JUPITER CORPORATION

OIL AND GAS DIVISION

510 Capital National Bank Building

HOUSTON, TEXAS 77002

Union Oil Company of California
Gas Accounting Department
P. O. Box 3386
Houston, Texas

Date December 6, 1966

Invoice No. 2729

ITEM	AMOUNT
Net Payment: 10 Days	
To invoice you for transportation of gas from the Rollover Feld, Vermilion Parish, Louisiana, for the month of October, 1966, pursuant to our FPC Gas Rate Schedule No. 7, Supplement No. 5:	
Total Volume Transported 2,890,240 Mcf @ 15,025 Psia @ $0.03 or	
Total Volume Transported 2,600,330 Mcf @ 16.7 Psia @ $0.033348	$28,942.20

[3479]

INVOICE

THE JUPITER CORPORATION
HOUSTON, TEXAS 77002

OIL AND GAS DIVISION

510 Capital National Bank Building
Houston, Texas 77002

Union Oil Company of California	Date December 6, 1966
Gas Accounting Department	
P. O. Box 3386	Invoice No. 2729-A
Houston, Texas	

ITEM	AMOUNT
Net Payment: 10 Days	
In accordance with the request contained in your letter of November 23, 1966, to invoice you for service rendered, other than the transportation of gas. The services to which this invoice applies includes the gathering of condensate and the separating of condensate from gas and the performance of all other services provided for under our agreement dated January 2, 1957, except the transportation of gas, and exclusive of compression, during the month of October, 1966	$68,482.70

Attachment B
December 6, 1966

Union Oil Company of California
P. O. Box 3326
Houston, Texas 77001

Attention: Mr. Charles T. May

Gentlemen:

We have your letter of November 23, 1966, returning our Invoice No. 2729, in which letter you request that we submit our invoice for the same period covered by Invoice No. 2729 using the rates of compensation set forth in Section 7 of our Agreement dated January 2, 1957.

In accordance with your request, we are submitting two invoices. The first covers the transportation of gas and, pursuant to our FPC Gas Rate Schedule No. 7, Supplement No. 5, the amount invoiced on this item is calculated on the basis of \$0.01 per MCF of gas transported at 15.024 PSIA. The second covers all other services provided for in our Agreement except transportation of gas and compression. This second invoice is calculated on the basis of the difference between (a) \$0.01 per MCF of gas transported and (b) the rates of compensation set forth in Section 7 of our Agreement covering all services to be rendered by us under said Agreement, including the transportation of gas.

Very truly yours,

THE JUPITER CORPORATION

R. C. Kolbye
Assistant Secretary-Treasurer

RCK dc
Enclosures

Attachment C

UNION OIL COMPANY OF CALIFORNIA
800 Prudential Building
HOUSTON, TEXAS 77025

November 23, 1966

The Jupiter Corporation
510 Capital National Bank Bldg.
Houston, Texas 77002

Attention: Mr. R. C. Kolbye

Gentlemen:

Re: Jupiter's Invoice No. 2729

We are in receipt of the subject invoice dated November 14, 1966 indicating an amount due based upon a transportation charge of 1 cent per MCF. This invoice purports to be tendered per the terms of our contract dated January 2, 1957 which governs transportation and separation of gas and condensate produced in our Rollover Field, Vermilion Parish, Louisiana.

As you know, Section 7 of our Hydrocarbon Gathering and Separating Agreement dated January 2, 1957 sets forth the compensation rates to be paid for the services you render to us. In view of your use of a compensation rate not provided for in our agreement referred to above, we return to you herewith the captioned invoice and request that you submit your invoice for the same period using the rates of compensation set forth in Section 7 of the agreement.

If it is now the desire of Jupiter to modify Section 7 of the aforementioned Hydrocarbon Gathering and Sepa-

rating Agreement to provide for the flat rate of 1 cent per MCF as used per your invoice No. 2729, we would be happy to entertain a proposed amendment to this agreement by which this rate is substituted in lieu of the compensation rates now set forth in Section 7.

Very truly yours,

UNION OIL COMPANY OF CALIFORNIA

/s/ Chas. T. May
Chas. T. May

CTM:cw
Enclosure

[3482]

INVOICE

THE JUPITER CORPORATION
OIL AND GAS DIVISION
510 Capital National Bank Building
HOUSTON, TEXAS 77002

Union Oil Company of California	Date
Gas Accounting Department	November 14, 1966
P. O. Box 3326	
Houston, Texas	INVOICE NO. 2729

NET PAYMENT: 10 DAYS

ITEM	AMOUNT
To invoice you for transportation of gas from the Rollover Field, Vermilion Parish, Louisiana, for the month of October, 1966 per our contract dated January 2, 1957	
Total Volume Transported 2,890,220 Mcf @ 15.025 Psia @ $.01	$28,902.20

[3483]

UNION OIL COMPANY OF CALIFORNIA
800 Prudential Building
Houston 25, Texas
December 12, 1966

Re: Jupiter's Invoice
Nos. 2729 and 2729-A

The Jupiter Corporation
510 Capital National Bank Building
Houston, Texas

Attention: Mr. R. C. Kolbye
Assistant Secretary-Treasurer

Gentlemen:

We wish to acknowledge receipt of your letter dated December 6, 1966, with which you submitted two invoices, one covering the "transportation of gas" and the other covering "all other services, except compression", provided for in our hydrocarbon gathering and separating agreement dated January 2, 1957. The subject invoices were tendered to us in lieu of your original invoice No. 2729 dated November 14, 1966, which was returned to you with our letter of November 23, 1966.

It was not our intent nor the purpose of our recent letter to solicit from Jupiter the two in lieu invoices, in each of which you have used "rates of compensation" not provided for in our agreement. Section 7 of the agreement sets forth the rate of compensation to be applied to the volumes indicated therein and this single rate, although expressed in terms of "cents per Mcf", is the compensation provided in our agreement for services rendered in connection with "both" gas and condensate delivered to you under the agreement.

(3483)

While we do not object to any allocation of the total compensation rate that Jupiter may elect to make for its internal or non-contractual purposes, Union cannot affirm such allocation when submitted by invoice or invoices purporting to be made pursuant to its agreement with Jupiter. It would be equally unacceptable to Union to pay an invoice on which any such extra-contractual allocation is noted or referenced. Therefore, we request that Jupiter resubmit its revised invoice showing the compensation rate set forth in Section 7 of the agreement applied to the applicable volume for the period covered. Upon receipt of such resubmitted invoice, we will promptly remit our check in payment thereof.

[3484]

The Jupiter Corporation
Attention: Mr. R. C. Kolbye
Page 2.

You invoices No. 2729 and No. 2729-A are returned to you herewith.

Yours very truly,

UNION OIL COMPANY
OF CALIFORNIA

By /s/ CHAS. T. MAY
Chas. T. May

CTM/ts
Encls.

cc — Mr. Henry B. Eubank
Union Oil Company of California
Los Angeles, California

[3485]

Attachment F

Page 1

INVOICE

THE JUPITER CORPORATION

OIL AND GAS DIVISION
510 CAPITAL NATIONAL BANK BUILDING
HOUSTON, TEXAS 77002

Union Oil Company of California   Date November 14, 1966
Gas Accounting Department
P. O. Box 3326
Houston, Texas

Please remit to: Philip Rootberg
Financial Vice President
The Jupiter Corporation
10 South LaSalle Street
Chicago, Illinois 60603

Net payment: 10 days

ITEM		AMOUNT
To invoice you for service relative to the Rollover Field, Vermilion Parish, Louisiana, for the month of October, 1966 for contract dated January 2, 1957 between corporate predecessors of Jupiter and Union.		
Volume For Billing		
2,890,220 MCF at 15,625 Psia		
(1,937,589 at 16.7 Psia x $.84	$77,500.00	
(642,831 at 16.7 Psia x .09	19,884.90	$97,384.90

Attachment F
Page 2

INVOICE

THE JUPITER CORPORATION
OIL AND GAS DIVISION
510 CAPITAL NATIONAL BANK BUILDING
HOUSTON, TEXAS 77002

DATE December 30, 1966

Union Oil Company of California
Gas Accounting Department
P. O. Box 3326
Houston, Texas

Please Remit To: Philip Rootberg
Financial Vice President
The Jupiter Corporation
10 South LaSalle Street
Chicago, Illinois 60603

Net payment: 30 days

ITEM		AMOUNT
To invoice you for services relative to the Roll-over Field, Vermilion Parish, Louisiana, for the month of November, 1966, per contract dated January 2, 1957 between corporate predecessors of Jupiter and Union.		
Volume For Billing		
2,874,238 MCF at 25.025 psia		
(3,075,000 at 15.7 Psia = \$.04)	\$75,000.00	
(740,938 at 16.7 Psia = \$.03)	21,328.55	\$95,328.56

[3487]

INVOICE

THE JUPITER CORPORATION

OIL AND GAS DIVISION

510 Capital National Bank Building

Houston, Texas 77002

Date January 10, 1967

Union Oil Company of California
Gas Accounting Department
P. O. Box 3326
Houston, Texas

Please Remit to: Philip Rootberg
Financial Vice President
The Jupiter Corporation
10 South LaSalle Street
Chicago, Illinois 68603

Net Payment: 10 Days

To invoice you for services relative to the Rollover Field, Vermilion Parish, Louisiana, for the month of December, 1966 per contract dated January 2, 1957 between corporate predecessors of Jupiter and Union.

Volume Per Billing

ITEM		AMOUNT
2,921,163 Mcf at 15.625 Psia		
1,937,500 at 16.7 Psia x $.03	$77,500.00	
630,672 at 16.7 Psia x $.09............	20,720.16	$98,220.16

(3488)

[3488]

Attachment G

January 20, 1967

Union Oil Company of California
P. O. Box 3326
Houston, Texas 77001

Attention: Mr. Charles T. May

Gentlemen:

Pursuant to your request, in your letter of December 12, 1966, that Jupiter continue its billing to Union, relative to the contract of January 2, 1957 between the corporate predecessors of those corporations, in the form of one invoice per month, there is submitted herewith single invoices for each of the following months: October, November and December, 1966.

Very truly yours,

Philip Rootberg
Financial Vice President

• • • •

CAPTION

[3544]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of PHILLIPS PETROLEUM COMPANY and KERR-McGEE CORPORATION	Docket No. 68-111

PETITION OF PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR ORDER DIRECTING THE JUPITER CORPORATION TO PAY THE FILED RATE FOR PURCHASED GAS

PHILLIPS PETROLEUM COMPANY (Phillips) and KERR-McGEE CORPORATION (Kerr-McGee) hereby petition the Commission to issue its order directing The Jupiter Corporation (Jupiter) to pay to Phillips (on behalf of Phillips and Kerr-McGee) the rate for natural gas provided in the filed rate schedules covering Phillips-Kerr-McGee's sales to Jupiter from the Rollover Field, offshore Vermilion Parish, Louisiana. In support of such petition petitioners would show:

(1)

Phillips and Kerr-McGee are both corporations organized and existing under the laws of the State of Delaware. The principal place of business of Phillips is Bartlesville, Oklahoma, and of Kerr-McGee, Oklahoma City, Oklahoma. The [3545] names, titles and mailing addresses of the persons to whom communications concerning this petition are to be addressed are:

Phillips Petroleum Company:	Kenneth Heady Assistant General Attorney Phillips Petroleum Company Frank Phillips Building Bartlesville, Oklahoma 74003

(3545)

Kerr-McGee Corporation:	Lynn Adams General Counsel Kerr-McGee Corporation Kerr-McGee Building Oklahoma City, Oklahoma 73102

Phillips and Kerr-McGee are each independent producers of natural gas under the regulations of the Commission and are each engaged in exploration for and production of oil and gas in numerous states.

(2)

Phillips and Kerr-McGee are joint owners of leases in the Rollover Field, offshore Vermilion Parish, Louisiana. Natural Gas produced from said field is sold at the offshore platform to Jupiter under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56. The filed rate reflected in each of said rate schedules is 18.5¢ per Mcf. Such rate was established by the Commission in its Opinion No. 470, Phillips Petroleum Company, 34 FPC 486, issued August 11, 1965.

[3546]

(3)

By letter of June 29, 1967 (attached hereto as Exhibit A) Jupiter requested that Phillips-Kerr-McGee reduce the price for the Rollover Field from the authorized rate of 18.5¢ per Mcf to 17.1¢ per Mcf, claiming the latter price to be the contractual rate. Phillips, however, billed Jupiter for the June 1967 deliveries at the filed rate of 18.5¢ per Mcf (Phillips' invoice covered Kerr-McGee's interest also). Upon receipt of Phillips' invoice Jupiter, by letter dated July 26, 1967 (attached hereto as Exhibit B), inquired whether its June 29, 1967, letter had been taken into account in submitting the invoice for June 1967 deliveries. Phillips

replied by letter of August 2, 1967 (attached hereto as Exhibit C), stating that Jupiter's June 29, 1967 letter had been considered but that the proper rate for the Rollover Field sale was 18.5¢ per Mcf and requested payment at that rate.

As of August 25, 1967, Jupiter has failed and refused to pay Phillips-Kerr-McGee the filed rate for gas delivered during the month of June 1967 (for which payment was due under the contract on August 4, 1967). Further, Jupiter has filed suit against Phillips and Kerr-McGee in the Circuit Court of Cook County, Illinois, seeking to recover alleged "overcharges" by **[3547]** Phillips-Kerr-McGee, alleging the proper rate to have been 17.1¢ per Mcf rather than 18.5¢ per Mcf. A copy of Jupiter's Complaint in such action is attached as Exhibit D.

Phillips-Kerr-McGee have moved to dismiss Jupiter's action on the ground that primary jurisdiction of any rate question is vested in the Federal Power Commission. Such motion is attached hereto as Exhibit E.

Jupiter's refusal to pay the filed rates to Phillips and Kerr-McGee for the Rollover Field gas and the aforementioned action operate to deprive the latter of *rates contractually specified* and lawfully prescribed by the Commission in Opinion No. 470. In addition, such refusal and suit constitute a violation of the Commission's order approving a rate settlement in *The Jupiter Corporation*, Docket No. RI 63-212, issued June 28, 1966, 35 FPC 1091.

Wherefore, Phillips-Kerr-McGee request that the Commission enter its order determining that it has primary jurisdiction of the subject matter of the aforementioned suit, and enter its order directing The Jupiter Corporation to pay and continue to pay the lawful filed rate of 18.5¢ per Mcf for gas purchased by Jupiter from the Rollover Field

until such time as such rate may be changed by lawful action of the Commission. Phillips-Kerr-McGee further request that the Commission enter the latter order [3548] on an immediate, *ex parte* basis in order to maintain the *status quo* and to assure that petitioners will be paid for gas delivered from the Rollover Field on a continuing, month-to-month basis. Such extraordinary order is required for two reasons, (1) payments for the Rollover Field gas for the past 12-month period at the rate of 18.5¢ per Mcf have been approximately $275,000 to $300,000 per month, a sum which petitioners cannot and should not be required to forego pending an answer, investigation and decision on this petition; and (2) in light of the pleadings heretofore filed in *The Jupiter Corporation*, Docket No. RI 63-212, by Jupiter and G. Burton Liese in response to the petition by Tennessee for an order directing Jupiter to comply with certain Commission orders, there exists reasonable doubt concerning whether the management of The Jupiter Corporation will maintain such continuity as to be responsive to future Commission orders directing payment for past deliveries of gas.

Respectfully submitted,

PHILLIPS PETROLEUM COMPANY
By John R. Rebnar, Attorney

And on behalf of

KERR-McGEE CORPORATION
Lynn Adams, General Counsel

Bartlesville, Oklahoma
August 25, 1967

• • • •

STATE OF ILLINOIS } ss
COUNTY OF COOK }

IN THE CIRCUIT COURT OF COOK COUNTY

THE JUPITER CORPORATION,
a Delaware corporation,
Plaintiff,
vs.

PHILLIPS PETROLEUM COMPANY,
a Delaware corporation
and
KERR-McGEE CORPORATION,
a Delaware corporation,
Defendants

No. 67L12177
In Law

COMPLAINT

THE JUPITER CORPORATION, a Delaware corporation, by its attorneys, complains against the Defendants, PHILLIPS PETROLEUM COMPANY, a Delaware corporation and KERR-McGEE CORPORATION, a Delaware corporation, and alleges:

1. Plaintiff has its main office and principal places of business in Chicago, Illinois.

2. Defendant PHILLIPS has its main office in Oklahoma, and is engaged in doing business in many States, including Illinois.

3. Defendant KERR-McGEE has its main office in Oklahoma City, Oklahoma, and is engaged in doing business in many States, including Illinois.

4. Plaintiff is owner and operator of a small underwater pipeline system, located offshore of Vermilion Parish, Louisiana, in the Gulf of Mexico, in what is known as the "Rollover Field." This system was constructed by Ma-

rine Gathering Company, which, by merger, became the [3554] Commonwealth Oil Company, which, in turn, was merged into Plaintiff. Hereinafter, all actions of Plaintiff and those predecessor corporations will be referred to as acts of Plaintiff.

5. Defendants are owners and operators of certain leasehold interests to certain underwater areas in said "Rollover Field".

6. Since February 6, 1953, or shortly thereafter, Plaintiff has accepted natural gas and condensate produced by Defendants from Defendants' leaseholds into Plaintiff's Rollover Field system at offshore platforms and has delivered the gas to Tennessee Gas Pipeline Company, now a division of Tenneco, Inc. (Tennessee), (or a predecessor corporation) and the condensate to Defendants. This transfer of gas to Plaintiff is conducted pursuant to a contract, which has been amended, which provides for sale by Defendants to Plaintiff of the natural gas, but not the condensate, accepted, carried and delivered by Plaintiff. (See Exhibits 1, 2, 3 and 4, hereto).

7. The natural gas delivered to Tennessee is sold by Plaintiff to Tennessee pursuant to contract dated February 6, 1953 (See Exhibit 5, hereto), which has been amended (See Exhibits 6, 7 and 8, hereto).

8. The contract shown in Exhibit 1, hereto, as amended, provides that Plaintiff is to pay to Defendants for each Mcf (one thousand cubic feet) of "contract quality", an amount equal to the price per Mcf which Plaintiff receives from Tennessee for the natural gas produced by Defendants and sold by Plaintiff to Tennessee, less the amount of 3 cents per Mcf of "contract quantity". If the amount of "contract quantity" is less than 30,000 Mcf per month, however, the 3 cent figure shall be increased by fifteen one-hundredths

[3555] of one cent for each 1000 Mcf or portion thereof by which the contract quantity during such month is less than 30,000 Mcf. If the amount of the "contract quantity" is more than 30,000 Mcf per month, the 3 cent figure shall be decreased by two one-hundredths of one cent for each 1000 Mcf or portion thereof by which the contract quantity during such month is more than 30,000 Mcf.

9. Since June 1, 1966, Plaintiff has received payments from Tennessee at the level of 19.5c per Mcf.

10. Pursuant to the contract shown in Exhibit 1, as amended, the level of billings to, and collections from, Plaintiff by Defendants should have been reduced to a level of 3 cents, plus or minus the volume adjustment, per Mcf, below the above described 19.5c per Mcf level, at the time Plaintiff reduced its charge to Tennessee to 19.5c per Mcf. However, Defendants have billed and collected, for the months of June, 1966 through May, 1967, at the level of 18.5¢ per Mcf.

11. As a result of the overcharges described in point 10, above, the amounts paid by Plaintiff to Defendants for the following months, and the amounts which should have been paid for such months, are set forth below.

Month	Amount Paid	Actual Amount Payable	Difference
June, 1966	$ 304,056.01	$ 279,074.11	
July, 1966	313,564.83	287,801.66	
August, 1966	283,934.30	259,070.86	
September, 1966	293,976.47	269,187.10	
October, 1966	316,913.70	291,217.99	
November, 1966	336,887.41	311,393.22	
December, 1966	348,822.50	322,425.12	
January, 1967	350,949.63	324,770.68	
February, 1967	301,068.63	277,634.10	
March, 1967	281,945.92	257,256.60	
April, 1967	250,073.56	227,093.83	
May, 1967	278,730.99	254,021.86	
Totals	$3,660,923.95	$3,360,947.13	$299,976.82

Payments for subsequent months are not yet due, except for the month of June, 1967, for which Defendants have billed the amount of $286,199.07, and the actual amount due is $261,756.12.

12. Plaintiff has made demand upon Defendants for the amount due by Defendants to Plaintiff as a result of the above described overbilling and overpayments, but Defendants have refused to remit or acknowledge such amount, or to correctly bill Plaintiff.

13. By its Opinion No. 470, the Federal Power Commission purported to set the price to be charged by Defendants to Plaintiff at 18.5¢ per Mcf. Said order is subject, however, to the provision of law that no party may charge more than the proper price pursuant to contract. Since, as set forth hereinabove, the appropriate contract price is less than the above mentioned 18.5¢ price, neither the above mentioned order of the Commission nor any other order of the Commission has had the effect of allowing Defendants to lawfully charge or collect such price, particularly in view of the fact that the Commission has jurisdiction only over the transportation of natural gas in interstate commerce and does not have jurisdiction over transportation of condensate or other services performed by Plaintiff for Defendants pursuant to contract.

WHEREFORE, Plaintiff prays:

A. That a judgment in the amount of $299,976.82, together with proper interest thereon, plus costs of this action, be entered against Defendants herein.

B. That the Court enter its order that the contract shown in Exhibit 1, hereto, as amended, is valid and binding on the parties and that under such contract, Defendants

are and shall be obligated to pay to Plaintiff pursuant to paragraph 8, above.

[3557]

C. That the Plaintiff have such other and further relief as this Court shall deem proper.

....
Howard R. Koven

Friedman, Koven, Salzman
Koenigsberg, Specks & Homer
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Chicago, Illinois 60604
FI 6-8500

....
William W. Brackett
Paul E. Goldstein

Ross, Hardies, O'Keefe,
Babcock, McDugald & Parsons
122 South Michigan Avenue
Chicago, Illinois 60603
341-0515

State of Illinois }
County of Cook } ss

IN THE CIRCUIT COURT OF COOK COUNTY

The Jupiter Corporation,
a Delaware Corporation,
Plaintiff,
vs.

Phillips Petroleum Company,
a Delaware corporation,
and
Kerr-McGee Corporation,
a Delaware corporation,
Defendants.

No. 67L12177

MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE

PHILLIPS PETROLEUM COMPANY and KERR-McGEE CORPORATION, Defendants, move the Court to dismiss, or, in the alternative, hold in abeyance, the complaint of THE JUPITER CORPORATION herein and for cause would show:

1. The natural gas sold by Defendants to Plaintiff from the Rollover Field, offshore Louisiana, is a sale for resale in interstate commerce. The rate charged is therefore a matter wholly within the jurisdiction of the Federal Power Commission under the provisions of the Natural Gas Act, 15 U.S.C. §§ 717a-717w. The action should therefore be dismissed under the doctrine of "primary jurisdiction".

The rate charged by Defendants for gas sold from the Rollover Field is the rate at which the Federal Power Commission issued to Defendants a certificate of public convenience and necessity under § 7(c) of the Natural Gas

Act (15 U.S.C. § 717f(c)). [3561] Such certificate was issued in a contested proceeding to which Plaintiff was a party. The Commission's order in that proceeding, Opinion No. 470, appears at 34 FPC 486, a copy of which is attached in memorandum form as Exhibit A hereto.

The order of the Commission in that prior proceeding established that the Commission has previously assumed jurisdiction of the subject matter of Plaintiff's action herein and that such jurisdiction continues. Under the doctrine of primary jurisdiction courts will not determine a controversy which is within the jurisdiction of an administrative agency where the resolution of the question demands the exercise of administrative expertise and where a uniformity of application is essential to comply with the purpose of the statute to be administered — here, the Natural Gas Act. See Anno. 1 L.Ed. 2d 1596. A recent example of reference of matters within the primary jurisdiction of the Federal Power Commission to that agency is seen in *J. M. Huber Corp. v. Denman*, 367 F. 2d 104 (5th Cir. 1966).

In its Opinion No. 470, the Commission stated, ". . . we shall authorize Phillips and Kerr-McGee to receive 18.5 cents for their Rollover sales to Jupiter" (mimeo p. 5). Plaintiff's complaint herein seeks to reduce the amount received by Phillips and Kerr-McGee to 17.1¢ per Mcf rather than the 18.5¢ per Mcf authorized by the Commission. An authorized rate subject to the jurisdiction of the Commission can be changed only through the mechanism provided by Sections 4 and 5 of the Natural Gas Act (15 U.S.C. 717c, 717d). The Commission regards such rates as within its exclusive jurisdiction. [3562] *In Re Crow Drilling Company, Inc.*, 17 FPC 226, 241, relying on *State Corp. Comm'n. of Kansas v. FPC*, 206 F. 2d 690, 705 (8th Cir. 1953).

The Commissions' order attached as Exhibit A makes clear that the instant litigation is a continuation of a rate controversy between Plaintiff and Defendants; a controversy uniquely within the administrative expertise of the Commission and one which should be resolved by that agency. Defendants are, concurrently with the filing of this motion, invoking the jurisdiction of the Commission to resolve the controversy by filing a petition seeking a Commission order directing Plaintiff to pay the filed rate for gas purchased by Plaintiff from the Rollover Field. A copy of such petition is attached as Exhibit B.

Under the foregoing circumstances dismissal of Plaintiff's action herein is required, *Far East Conference v. United States*, 342 U.S. 570 (1952).

2. The Commission's prior order establishing Defendants' rates for gas sales to Plaintiff (Exhibit A) also shows conclusively that the question of the proper rate to be charged by Defendants has been previously litigated to a final decision in a proceeding in which Plaintiff was a party. The action herein should be dismissed on the ground that the prior decision of the Federal Power Commission is res adjudicata of the action herein and on the corollary ground that Plaintiff's instant action is an improper collateral attack on the prior decision of the Commission.

WHEREFORE, Defendants move:

A. That the Court enter its order dismissing Plaintiff's Complaint herein on the grounds stated.

[3563]

B. That, in the alternative, the Court enter its order abating the Plaintiff's complaint pending action by the

Federal Power Commission on the Defendants' petition attached hereto as Exhibit B.

Sidney & Austin
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Defendants

Lloyd G. Minter
Kenneth Heady
John R. Rebman
Attorneys for
Phillips Petroleum Company
Frank Phillips Building
Bartlesville, Oklahoma 74003

Lynn Adams
Attorney for Kerr-McGee
Corporation
Kerr-McGee Building
Oklahoma City, Oklahoma 73102

• • • •

CAPTION
[3571]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

In the Matter of PHILLIPS PETROLEUM COMPANY and KERR-MCGEE CORPORATION	Docket No. ....

AMENDMENT TO PETITION OF PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR ORDER DIRECTING THE JUPITER CORPORATION TO PAY THE FILED RATE FOR PURCHASED GAS

PHILLIPS PETROLEUM COMPANY (Phillips) and KERR-McGEE CORPORATION (Kerr-McGee) have here-

tofore filed (on August 31, 1967) their Petition seeking the entry of the Commission's order directing The Jupiter Corporation (Jupiter) to pay to Petitioners the filed rate for natural gas sold by Petitioners to Jupiter from the Rollover Field, offshore Vermilion Parish, Louisiana. In paragraph (3) of said Petition it was alleged that Jupiter had failed to pay for gas delivered during the month of June 1967, which allegation was then true.

Since the filing of said Petition Jupiter has purported to make payment for gas delivered by Petitioners during the months of June and July 1967. Jupiter's letter of transmittal [3572] dated September 2, 1967, is attached hereto as Exhibit A and a copy of its check No. 18608 in the amount of $236,899.47 is attached as Exhibit B. By letter of September 15, 1967, such check was returned to Jupiter as unacceptable. Phillips' letter returning such check is attached hereto as Exhibit C.

Petitioners hereby amend their original petition filed August 31, 1967, to reflect the foregoing facts concerning Jupiter's improper payment for gas delivered in June and July 1967. Petitioners reiterate the necessity for an immediate order directing Jupiter to continue payments for gas deliveries at the 18.5¢ per Mcf rate pending the Commission's final decision in the premises. As is apparent from an examination of Jupiter's letter of transmittal and check (Exhibits A and B), Jupiter has undertaken to unilaterally establish a rate for natural gas purchased from Petitioners, both retroactively and prospectively, different from the rate authorized by Opinion No. 470. Such a change in rate cannot

be effected by unilateral action of the purchaser: Commission authorization is required.

Bartlesville, Oklahoma
September 15, 1967

Respectfully submitted,

PHILLIPS PETROLEUM COMPANY

By /s/ John R. Rebman

Kenneth Heady
John R. Rebman
Attorneys for
Phillips Petroleum Company

[3573]

And on behalf of

Kerr-McGee Corporation
Lynn Adams
General Counsel

VERIFICATION

STATE OF OKLAHOMA
COUNTY OF WASHINGTON

LEROY CULBERTSON, being first duly sworn, deposes and says that he is a Vice President of Phillips Petroleum Company, that he has read the foregoing Amendment to Petition and that the statements contained therein are true and correct to the best of his information and behalf.

....

LEROY CULBERTSON

Subscribed and sworn to before me this .... day of September, 1967.

....

Notary Public

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the following parties in this proceeding [3574] in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Bartlesville, Oklahoma this 15th day of September, 1967.

JOHN R. REBMAN

Of Counsel for
PHILLIPS PETROLEUM COMPANY

• • • •

CAPTION
[3610]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of The Jupiter Corporation The Pure Oil Company,[1] *et al.*	Docket Nos. RI63-212, *et al.* G-16790, *et al.*

SUPPLEMENT TO PETITION OF TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC, FOR AN ORDER DIRECTING JUPITER CORPORATION AND UNION OIL COMPANY OF CALIFORNIA TO COMPLY WITH COMMISSION ORDERS IN THE ABOVE PROCEEDINGS

On June 1, 1967, Tennessee Gas Pipeline Company (Tennessee), a Division of Tenneco Inc., filed its petition with

---

[1] Union Oil Company of California is now successor in interest to The Pure Oil Company.

the Commission in the above captioned proceedings for orders directing Jupiter Corporation (Jupiter) and Union Oil Company (Union) to comply with the Commission's orders issued in the above proceedings. Specifically, Tennessee requested the Commission to issue an order or orders (1) directing Jupiter to charge for gas transported from the Rollover Field, Offshore Vermillion Parish, Louisiana for the account of Union since May 15, 1966 no more than the one cent (1.0¢) rate provided in Jupiter's FPC Gas Rate Schedule No. 7, as revised pursuant to the Jupiter settlement approved by Commission order issued June 28, 1966, and (2) directing Union to charge Tennessee no more than 1.0¢ per Mcf for the transportation of gas pursuant to Union's FPC Gas Rate Schedule No. 120, as supplemented.

[3611]

The purpose of this Supplement is to appraise the Commission as to certain events which have occurred since the filing of the above petition of Tennessee in order that the Commission may be fully informed in the premises.

Since the filing of the above petition by Tennessee, and, indeed, subsequent to the filing of answers thereto by Jupiter and Union, Jupiter and Union have instituted proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, seeking to have that court pass on and decide the controversy which is the subject of Tennessee's petition herein. Copies of Jupiter's Complaint against Union and Union's Third Party Complaint against Tenneco in that court proceeding are attached hereto as Appendices A and B, respectively. As pointed out in the Motion to Stay Proceedings, or in the Alternative to Dismiss, filed by Tenneco in that proceeding,

and Tenneco's Memorandum in support thereof (copies of which are attached hereto as Appendices C and D, respectively), we believe that the matter is within the primary jurisdiction of this Commission and hence that the District Court should either stay or dismiss the proceedings instituted before that Court.

Respectfully submitted,
TENNESSEE GAS
PIPELINE COMPANY,
A DIVISION OF
TENNECO INC.

By...
Jack Werner, Attorney

Jack Werner
Melvin Richter
Littman and Werner
1001 Connecticut Avenue
Washington, D. C. 20036

Harry S. Welch
W. C. Braden, Jr.
Roy C. Alletag
P. O. Box 2511
Houston, Texas 77001

Attorneys for Tennessee Gas Pipeline Company, A Division of Tenneco Inc.

October 4, 1967.

* * * *

[3613]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE JUPITER CORPORATION, a Delaware corporation, *Plaintiff.* v. UNION OIL COMPANY OF CALIFORNIA, a California corporation. *Defendant.*	Civil Action No. ....

Filed August 11, 1967

COMPLAINT BY THE JUPITER CORPORATION AGAINST UNION OIL COMPANY OF CALIFORNIA

THE JUPITER CORPORATION, a Delaware corporation, by its attorneys, complains against the Defendant, UNION OIL COMPANY OF CALIFORNIA, a California corporation, and alleges:

1. Plaintiff has its main office and principal places of business in Chicago, Illinois.

2. Defendant has its main office in Los Angeles, California, and has its principal place of business in a State other than the State of Illinois.

3. The amount in controversy herein, exclusive of interest and costs, exceeds the sum of $10,000.00.

4. Plaintiff is owner and operator of a small underwater pipeline system, located offshore of [3614] Vermilion Parish, Louisiana, in the Gulf of Mexico, in what is known as the "Rollover Field." This system was constructed by Marine Gathering Company, which, by merger, became the Commonwealth Oil Company, which, in turn, was merged

into Plaintiff. Hereinafter, all actions of Plaintiff and those predecessor corporations will be referred to as acts of Plaintiff.

5. Defendant is owner and operator of certain leasehold interests to certain underwater areas in said "Rollover Field", having succeeded to such position by virtue of having acquired, as surviving corporation in a merger, The Pure Oil Company, which was the owner of said leaseholds. Hereinafter, all acts of Defendant and The Pure Oil Company, before said merger, will be referred to as acts of Defendant.

6. Since March 15, 1950 or shortly thereafter, Plaintiff has accepted natural gas and condensate produced by Defendant from Defendant's leaseholds into Plaintiff's Rollover Field system at offshore platforms and has delivered the gas to Tennessee Gas Pipeline Company, now a division of Tenneco, Inc. (Tennessee) (or a predecessor corporation) and the condensate to Defendant. These transactions were originally conducted pursuant to contracts, from time to time amended, which provided for [3615] sale by Defendant to Plaintiff of natural gas. By separate contract, from time to time amended, Plaintiff resold to Tennessee. These contractual relationships provided, and if continued would have provided, great economic benefits to Plaintiff. By document dated January 2, 1957, however, the pre-existing contracts between Plaintiff and Defendant were cancelled and Plaintiff assigned its interest in its contract with Tennessee, to Defendant (See Exhibit 1, hereto).

By document also dated January 2, 1957, and termed a "Hydrocarbon Gathering and Separating Agreement", Plaintiff agreed, inter alia, to receive gas and condensate produced by Defendant and deliver the gas to Tennessee and the condensate to Defendant, on shore, and to separate gas from condensate. For the services performed, the docu-

ment provides that Plaintiff receive 4 cents per Mcf of gas and condensate gathered, up to 62,500 Mcf per day, and 3 cents per Mcf per day gathered in excess of that amount. (See Exhibit 2, hereto.)

7. By the terms of the contract shown as Exhibit 2, hereto, Defendant has been, is, and shall be, obligated to pay Plaintiff the charges specified in said Point 6, above, during the life of said contract and extensions thereof. Said contract states that its term [3616] is from 7:00 A.M. on its effective date (early 1957) to 7:00 A.M. on March 1, 1971.

8. Defendant has not paid any portion of the charges due to Plaintiff under said contract shown as Exhibit 2, hereto, for each month since March, 1967. Plaintiff therefore makes claim for the following sums due under said contract: $88,560.99 for the month of April, 1967; $95,591.02 for the month of May, 1967; and $88,490.52 for the month of June, 1967. Payment for subsequent months is not yet due. Despite demand for payment of the above-listed sums, Defendant has failed to make payment.

9. By order issued June 28, 1966, in Docket No. RI63-212, the Federal Power Commission, pursuant to settlement agreement, directed Plaintiff to charge Defendant 1¢ per Mcf for transporting Defendant's gas. Said order, however, did not and could not have affected Defendant's total liability to Plaintiff, since the Commission has jurisdiction only over the transportation of natural gas in interstate commerce and does not have jurisdiction over transportation of condensate and other services performed by Plaintiff for Defendant pursuant to contract. The Commission, therefore, did not alter and could not have altered, the total amount due by Defendant to Plaintiff pursuant to said contract.

[3617]

WHEREFORE, Plaintiff prays:

A. That a judgment for the amounts listed in Point 8, above, totaling $272,642.53, together with proper interest thereon, plus costs of this action, be entered against Defendant herein.

B. That this Court enter its order that the contract shown in Exhibit 2, above, is valid and binding on the parties and that under such contract, Defendant is and shall be obligated to pay to Plaintiff the amount of 4 cents per Mcf of natural gas and condensate delivered to Defendant each day up to 62,500 Mcf per day and 3 cents per Mcf per day for each Mcf delivered in excess of 62,500 Mcf.

C. That the Plaintiff have such other and further relief at this Court shall deem proper.

....

Howard R. Koven

Friedman, Koven, Salzman,
Koenigsberg, Specks & Homer
208 South LaSalle Street
Chicago, Illinois 60604
FI 6-8500

....

William W. Brackett
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Chicago, Illinois 60603
341-0515

• • • •

[3619]

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE JUPITER CORPORATION, a Delaware corporation, *Plaintiff* v. UNION OIL COMPANY OF CALIFORNIA, a California corporation, *Defendant*	CIVIL ACTION No. 67 C 1398

THIRD PARTY COMPLAINT

Comes now Third Party Plaintiff UNION OIL COMPANY OF CALIFORNIA (UNION) and with leave of Court, complaining of TENNECO, INC. (TENNECO), Third Party Defendant, and for cause would show as follows:

I.

Union is a California corporation duly authorized and doing business in the State of Illinois.

II.

Tenneco is a Delaware corporation doing business in the State of Illinois whose registered agent for the service of process is C. T. Corporation System, 208 So. La Salle Street, Chicago, Illinois.

[3620]

III.

The amount in controversy herein, exclusive of interest and costs, exceeds $10,000.

IV.

Union (as successor by merger with The Pure Oil Company) is a producer of natural gas and gas condensate liquids in what is known as the Rollover Field located in the Gulf of Mexico approximately 10 miles offshore from Vermilion Parish, Louisiana. Pursuant to contract of January 2, 1957 (Hydrocarbon Gathering and Separating Agreement, Exhibit 2 to Plaintiff's complaint), Plaintiff, The Jupiter Corporation (Jupiter) gathers said gas and gas condensate, transports the same to shore, separates the gas from the condensate, redelivers the condensate to Union and delivers the gas to Tenneco, operator of a major natural gas pipeline system. For this service the said contract provides that Union shall pay Jupiter four cents (4¢) per MCF for the first 62,500 MCF and three cents (3¢) for all volumes in addition. The composite rate is approximately 3.4¢ per MCF.

[3621]

V.

Pursuant to another contract dated January 2, 1957 (Agreement Relating to Contracts — Exhibit 1 to Plaintiff's complaint) as amended December 19, 1962, Tenneco has agreed to pay Union as follows:

"The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder shall be the sum of (a) and (b) below:

(a) From the date of Federal Power Commission authorization to November 1, 1966 .... 16.75 cents per MCF

From November 1, 1966 to November 1, 1970 .... 17.75 cents per MCF

From November 1, 1970 to
date of expiration of this
Contract .... 18.75 cents per MCF

(b) The average payment in cents per MCF paid to The Jupiter Corporation by The Pure Oil Company for gas transported, which shall be determined monthly by dividing the total payment made by The Pure Oil Company to The Jupiter Corporation by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4c) per Mcf for the first sixty-two thousand, five hundred (62,500) Mcf per day and three cents (3c) per Mcf on additional volumes."

[3622]

VI.

The aforesaid rates and charges for Union's gas to be paid by Tenneco are on file with the Federal Power Commission as Union's Federal Power Commission Gas Rate Schedule #120 and were approved[1] by order of the said Federal Power Commission at Docket G-16790, et al, on November 27, 1962.

VII.

By order issued June 28, 1966, at Docket No. RI63-212 the Federal Power Commission ordered Jupiter to reduce its charges for the transportation of Union's gas to 1c per MCF, while expressly declining to take any position as to

[1] Subject only to the suspension powers granted the Commission relative to the 1¢ periodic escalations under Section 4 of the Natural Gas Act, 15 U.S.C. 717(c), and the prospective rate orders permitted under Section 5 of the Natural Gas Act, 15 U.S.C. 717(d).

whether Jupiter might or might not be entitled to collect any sums in addition thereto for performing services in connection with condensate.

[3623]

VIII.

Thereafter Jupiter sought to invoice Union by separate invoice at 1¢ per MCF for the transportation of gas and 2.4¢ (approximate) per MCF for the transportation of condensate. Such invoices were rejected by Union as the contract (Exhibit 2 to Plaintiff's complaint) provides for the payment of a single rate for all services rather than a two-part rate, one for gas and another for condensate. In light of the Commission's aforesaid order of June 28, 1966, Union offered to amend the contract to provide a total price of 1¢ per MCF but such offer was declined by Jupiter. Thereafter Jupiter invoiced Union at the single contract rate of 3.4¢ (approximate) per MCF and Union paid the sum of $556,820.17 for the months October, 1966 through March, 1967.

IX.

Thereafter Union, pursuant to its contract with Tenneco, invoiced Tenneco for the base price of 16.75¢ per MCF plus the sums paid by Union to Jupiter for transportation (approximately 3.4¢ per MCF). Tenneco declined to pay more than the 16.75¢ per MCF base price, contending that Jupiter's transportation charge for which Tenneco was to reimburse Union should have been only 1¢ per MCF.

[3624]

X.

In the light of Tenneco's position Union suspended all payments to Jupiter and no payments have been made since April, 1967.

XI.

Thereafter on June 1, 1967, Tenneco filed a complaint with the Federal Power Commission seeking resolution of the dispute. To date no hearings have been scheduled although Tenneco's complaint has been accepted for filing and assigned Docket No. RI63-212, et al.

XII.

Union would show that under the terms of its amended sales agreement with Tenneco which has been approved by and is on file with the Federal Power Commission, Union is in the posture of a mere conduit insofar as the Jupiter charges are concerned. Union is financially unconcerned with whether Jupiter charges 3.4¢ Mcf or 1c per MCF, its only concern being that it be fully reimbursed by Tenneco as its Commission approved contract clearly provides.

[3625]

XIII.

Union has paid Jupiter the sum of $556,820.17 for which it has received no reimbursement from Tenneco and is herein subjected to a further claim by Jupiter in the amount of $272,642.53 plus interest. It is entitled to judgment against Tenneco for the former sum plus interest and for any or all of the latter sum plus interest which the Court may find is due Jupiter, and it is further entitled to a judgment declaring Union's right to collect full reimbursement from Tenneco for all sums due from Union to Jupiter in the future.

WHEREFORE, PREMISES CONSIDERED, Third Party Plaintiff, Union Oil Company of California, prays that summons issue for Third Party Defendant, Tenneco,

Inc., and that upon final hearing here in it have judgment against Tenneco, Inc. for all sums previously paid by Union to Jupiter and yet unreimbursed plus any sums found by the Court to be due Jupiter by Union plus declaratory judgment of its future entitlement to full reimbursement by Tenneco of sums paid by Union to Jupiter plus interest, costs of court and general relief.

VINSON, ELKINS, WEEMS & SEARLS

By...

John C. Snodgrass
First City National Bank Building
Houston, Texas 77002

....

200 East Golf Road
Palatine, Illinois 60067

• • • •

[3627]

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE JUPITER CORPORATION, a Delaware corporation, *Plaintiff*, v. UNION OIL COMPANY OF CALIFORNIA, a California corporation, *Defendant*. and UNION OIL COMPANY OF CALIFORNIA, a California corporation, *Third Party Plaintiff*. v. TENNECO INC., a Delaware corporation, *Third Party Defendant*.	No. 67 C 1398

MOTION BY THIRD PARTY DEFENDANT TENNECO INC. TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO DISMISS.

Now comes Tenneco Inc. Third Party Defendant, by Justin A. Stanley, Harry S. Welch, Jack Werner, Robert A. Helman, and George W. Hamman, its attorneys, and moves that all further proceedings in this matter be stayed pending a resolution by the Federal Power Commission of the matters presented to it [3628] under Docket Nos. RI 63-212 and G-16790, or, in the alternative, that this suit be dismissed. In support hereof Tenneco Inc. is filing simul-

taneously herewith a Memorandum and Appendix which are incorporated herein by reference.

TENNECO INC.,
Third Party Defendant, by

....
Justin A. Stanley

....
Robert A. Helman

....
George W. Hamman

Mayer, Friedlich, Spiess,
Tierney, Brown & Platt
231 South LaSalle Street
Chicago, Illinois 60604
STate 2-0600

Harry S. Welch
P. O. Box 2511
Houston, Texas

Jack Werner
Littman & Werner
Suite 1010
1001 Connecticut Avenue
Washington, D. C.

[3629]

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE JUPITER CORPORATION, a Delaware corporation, *Plaintiff.* v. UNION OIL COMPANY OF CALIFORNIA, a California corporation, *Defendant.* and UNION OIL COMPANY OF CALIFORNIA, a California corporation, *Third Party Plaintiff.* v. TENNECO INC., a Delaware corporation *Third Party Defendant.*	No. 67 C1398

MEMORANDUM IN SUPPORT OF MOTION BY THIRD PARTY DEFENDANT, TENNECO INC., TO STAY PROCEEDINGS OR, IN THE ALTERNATIVE, TO DISMISS

This is a diversity action brought by The Jupiter Corporation ("Jupiter") which transports natural gas by undersea pipeline from offshore wells in the Rollover Field in the Gulf of Mexico to an onshore Louisiana station. [3630] The defendant, Union Oil Company of California ("Union"), produces the natural gas which is so transported by Jupiter. At the onshore Louisiana station, the gas is sold by Union (and delivered by Jupiter for Union's account) to Tennessee Gas Pipeline Company, a Division of Tenneco Inc. ("Tenneco"), the third party defendant.

Jupiter, Union and Tenneco are all "natural gas companies" subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act (15 U.S.C. §§ 717, *et seq.*).

The rates for the transportation of gas by Jupiter are required to be, and are, set forth in rate schedules on file with the Federal Power Commission; likewise the rates for the gas sold by Union to Tenneco are required to be, and are, set forth in rate schedules on file with the Federal Power Commission.

The basic question involved here is: what is the rate Union is obligated to pay Jupiter for the transportation of Union's gas? it is that rate which Tenneco, pursuant to the rate schedule of Union, is obligated to pay Union. As shown below, the determination of this basic question is a matter within the primary jurisdiction of the Federal Power Commission.

There follows a brief summary of the proceedings before the Federal Power Commission which are relevant to [3631] this case.

Prior to November, 1962, Pure Oil Company (Union's predecessor) sold gas from the Rollover Field to Tenneco under a rate schedule filed with the Federal Power Commission which provided for a charge of 21.3333¢ per Mcf (one thousand cubic feet) including the transportation charge of Jupiter. On November 27, 1962, in Docket Nos. G-16790, *et al.*, the Federal Power Commission entered an order approving a rate settlement proposed by Pure which reduced the rate which Pure charged Tenneco for gas from the Rollover Field to 16.75¢ per Mcf "plus reimbursement of the charges Pure has to pay [to Jupiter] for transportation." In that order the Federal Power Commission stated that "Pure has agreed to charge only that amount it actually

has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein. . . ." (See page 3 of Item 1 in Appendix to this Memorandum.)

Prior to May 15, 1966, the effective date of an order issued by the Federal Power Commission in Docket Nos. RI63-212, *et al.*, Jupiter's rates for transporting gas from the Rollover Field purchased by Tenneco from Union, averaged 3.4¢ per Mcf. The Federal Power Commission, in **[3632]** that Order, however, approved a rate settlement proposed by Jupiter which, in the words of the Commission, "would accomplish the following: a reduction in Jupiter's transportation rate of approximately 65% which would effect an immediate reduction in Tennessee's purchased gas costs of over $1,000,000 annually without further litigation; establishment of a firm transportation rate of 1.0¢ per Mcf; . . ." (See pages 3 and 5 of Item 3 in Appendix to this Memorandum.)

Pursuant to this Order, Jupiter, on July 13, 1966, filed with the Federal Power Commission its changes in rate schedule No. 7, setting forth the charge of "one cent (1.0¢) per Mcf at a pressure base of 15.025 psia for natural gas delivered to Tennessee Gas Pipeline Company, a division of Tenneco Inc., for the account of Union Oil Company of California." (See Item 4 in Appendix to this Memorandum.)

The controversy between Jupiter and Union arises from the fact that liquid condensates are produced by Union along with natural gas from the Rollover Field. The natural gas which Jupiter transports contains these condensates. At Jupiter's onshore station, Jupiter separates the natural gas from the condensates; it then delivers the natural gas to **[3633]** Tenneco for the account of Union and delivers the condensates to Union.

(3633)

On August 22, 1966, the Commission took account of this matter and, in a clarifying order in Jupiter's Docket Nos. RI63-212, *et al.*, stated "any contractual arrangements Jupiter makes with the producers [*i.e.*, Union] for those services [transportation of the condensates] will be acted upon *if and when they are appropriately submitted to this Commission.*" (Underscoring supplied.) (See Item 5 in Appendix to this Memorandum.)

To resolve the controversy about the proper charge, Tenneco, on June 1, 1967, filed with the Federal Power Commission in Docket Nos. RI63-212, *et al.*, and G-16790, *et al.*, a petition "for an order directing Jupiter Corporation and Union Oil Company of California to comply with Commission orders in the above proceedings." * (See Item 6 in Appendix to this Memorandum.)

On June 26, 1967, Union filed its answer to Tenneco's petition in which it stated, *inter alia* (Page 15 of Item 7 in Appendix to this Memorandum):

> "Perhaps because the Commission felt such a controversy would never arise, the problem created [3634] by Jupiter's attempted "reservation of rights" was not decided when raised by Phillips and Kerr-McGee on petition for rehearing of the order approving Jupiter's settlement. If the problem was speculative and inchoate, then it certainly is no longer. *It could be resolved by appropriate findings of the Commission* with an order requiring Jupiter to amend Section 7 of the Hydrocarbon Gathering and Separating Agreement and to file a rate schedule amendment providing for a rate per Mcf for all services performed under Jupiter's Rate Schedule No. 7, and directing Tennessee to pay

* Tenneco is, of course, willing to reimburse Union for the 1¢ transportation charge of Jupiter as reflected in Jupiter's rate schedule filed in compliance with the Commission's Order issued June 28, 1966.

Union's filed rate which would continue to include whatever rate Jupiter charges Union for such services." (Underscoring supplied.)

On June 28, 1967, Jupiter filed its response to the petition of Tenneco in which it stated, *inter alia* (Page 4 of Item 8 in Appendix to this Memorandum):

"The Tennessee Petition herein raises not only the request that Jupiter should charge only 1¢ per Mcf for the gas of Union which it carries (which Jupiter is now charging), but also that Union should charge Tennessee, in total, 1¢ per Mcf. *This latter request raises questions of interpretation of the Commission's order in Union's own rate settlement*, in Docket No. G-16790, et al. including the question of whether the Commission intended to, or, indeed, could, order and authorize Union's predecessor to collect for non-jurisdictional services which Union receives relative to the condensate owned by Union and carried for Union by Jupiter." (Underscoring supplied.)

It is clear from the foregoing that the matter involved here pertains to the ratemaking function of the Federal Power Commission; that the matter is now actually before the Commission; and that the Commission must be given [3635] the opportunity to discharge its ratemaking function. This case thus falls within the doctrine of primary jurisdiction, which, as the Supreme Court has held:

"applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pacific RR.*, 352 U.S. 59, 64 (1956).

This standard has been repeatedly applied by the Supreme Court. See, *e.g., Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952); *Pennsylvania RR. v. United States*, 363 U.S. 202, 203 (1960). See also *J. M. Huber Corp. v. Denman*, 367 F.2d 104 (5th Cir. 1966).

Accordingly, it is respectfully submitted that the appropriate procedure here is to stay any further proceedings in this Court until the Federal Power Commission has had an opportunity to resolve the rate matter now pending before it. *United Gas Pipe Line Co. v. Tyler Gas Service Co.*, 247 F.2d 681, 683 (5th Cir. 1957). Alternatively, inasmuch as the Commission's order is subect to judicial review, this action may be dismissed subject to being initiated later, if appropriate. *Far East Conference v. United States*, 342 U.S. 570, 577 (1952).

[3636]

Respectfully submitted,
TENNECO INC.,
Third Party Defendant,

By: Justin A. Stanley
Justin A. Stanley

Robert A. Helman
Robert A. Helman

George W. Hamman
George W. Hamman

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Suite 1010, 1001 Connecticut
Ave. N.W.
Washington, D. C. 20036
Its Attorneys

[3637]

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of September, 1967, he mailed a copy of the foregoing Motion by Third Party Defendant Tenneco Inc. to Stay Proceedings or, in the Alternative, to Dismiss, and Memorandum (and Appendix) in Support of Motion by Third Party Defendant, Tenneco Inc. to Stay Proceedings or, in the Alternative, to Dismiss to John C. Snodgrass, Vinson, Elkins, Weems & Searls, First City National Bank Building, Houston, Texas 77002, Ben A. Harper, 200 East Golf Road, Palatine, Illinois 60067, Howard R. Koven, Friedman, Koven, Salzman, Koenigsberg, Specks & Homer, 208 South La Salle Street, Chicago, Illinois 60604 and William W. Brackett and Paul E. Goldstein, Ross, Hardies, O'Keefe, Babcock, McDugald & Parsons, 122 South Michigan Avenue, Chicago, Illinois 60603, by prepaid mail.

George W. Hamman,
George W. Hamman
Attorney

Mayer, Friedlich, Spies, Tierney,
Brown & Platt
231 South La Salle Street
Chicago, Illinois 60604
STate 2-0600

• • • •

CAPTION

[3646]

October 18, 1697

CERTIFIED MAIL — RETURN RECEIPT REQUESTED

FILED
OFFICE OF THE SECRETARY
10-20-67
FEDERAL POWER COMMISSION

Honorable Gordon M. Grant, Secretary
Federal Power Commission
441 "G." Street N.W.
Washington, D. C. 20426

Re: OAO
Docket No. RI63-212
The Jupiter Corporation
Docket No. G-16790
Union Oil Company of California

Dear Sir:

Union Oil Company of California (Union) wishes to acknowledge receipt of the Secretary's letter dated October 9, 1967 enclosing a Supplement to Petition of Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee) tendered for filing by Tennessee in the above-entitled proceedings on October 4, 1967, and inviting Union's answer thereto within fifteen days from the date of said letter.

On or about the date Union received the Secretary's aforementioned letter and attachments, Union also received a service copy of Tennessee's Further Supplement to Petition in the above-entitled proceedings to which was appended a copy of Union's answer to The Jupiter Corporation's (Jupiter's) complaint in the litigation instituted by Jupiter in the United States District Court for the North-

ern District of Illinois, Eastern Division, Civil Action No. 67C 1398.

In view of the supplemental filing of Union's answer in the aforementioned civil action made by Tennessee, and in the interest of avoiding duplicative pleadings in the proceedings before the Commission, Union respectfully submits that an answer in response to the Secretary's letter would now be inappropriate. However, to the extent that an answer by Union may be deemed by the Commission to be deemed by the Commission to be necessary or desirable pursuant to Section 1.9(a) of the Commission's Rules of Practice **[3647]** and Procedure, Union hereby incorporates by reference herein as its answer to Tennessee's Supplement to Petition the Answer of Union filed in the aforementioned civil action and appended to Tennessee's Further Supplement to Petition dated October 9, 1967.

In addition to the foregoing, Union respectfully urges that the Commission schedule its hearings in the captioned proceedings at the earliest possible date due to the growing procedural complexities of these complicated, multi-party proceedings, and the unabated inequities inherent in a further delay thereof.

Very truly yours,
Orig. Signed By
George C. Bond
George C. Bond
Assistant Counsel

*　*　*　*

CAPTION

[3695]

TELEGRAM

(NAT. GAS & GAS LIQUIDS DEPT.)—PM 907
X-2-404 12 16 66 10:30 A.M.

Hon. Joseph H. Gutride, Secretary
Federal Power Commission
441 "G" Street, N.W.
Washington, D. C. 20426

In response to your letter of December 9, 1966 Re BNO-IP GC, Docket No. G-12583, Union Oil Company of California's FPC Gas Rate Schedule No. 120, requesting Union to submit a rate change reflecting the 1.0¢ per Mcf transportation charge resulting from the Jupiter Corporation's settlement approved by commission order issued June 28, 1966, Union must respectfully decline your request in view of the facts outlined hereinbelow:

(1) Federal Power Commission order issued November 27, 1962 in Docket Nos. G-16790, *et al.* Specifically approved this company's settlement proposal providing for a price of 16.75¢ per Mcf plus the charges actually paid by Pure (now Union) to Jupiter. Pursuant to this unconditional approval of Union's settlement proposal, Union filed with the commission as supplement No. 9 to the preferenced rate schedule an agreement with Tennessee Gas Transmission Company dated December 18, 1962 to provide for the aforementioned settlement rate plus the average payment in cents per Mcf paid to Jupiter for transportation. This supplement was duly accepted by the Commission.

(2) Jupiter tendered its invoice under date of November 14, 1966 in the amount of 1¢ per Mcf purportedly in accordance with the Jupter-Union Hydrocarbons

gathering and separating agreement dated January 2, 1957. Inasmuch as Union was not a party or a participant to the Jupiter settlement proceeding and the settlement and approval thereof did not modify Union's contract with Jupiter or with Tennessee under the captioned Rate Schedule No. 120, Union, by letter **[3696]** dated November 23, 1966, rejected Jupiter's invoice and, further advised Jupiter that if Jupiter wished to modify Section 7 of said agreement to provide for a flat rate of 1c per Mcf for transportation, Union would be pleased to amend said agreement to substitute 1c per Mcf in lieu of the compensation rates now set forth in said agreement. In response, Jupiter, by letter of December 6, 1966, tendered to Union two invoices totalling the transportation rate originally charged prior to Jupiter's settlement.

(3) In view of Tennessee's contractual obligation to reimburse all transportation charges paid by Union to Jupiter (Supplement No. 9 to Rate Schedule No. 120) and the Commission's order approving this charge as part of this company's settlement, it is inappropriate for Union to reduce its filed rate as requested to reflect any rate less than that charged Union per Jupiter's invoice.

C. E. SMITH
UNION OIL COMPANY OF
CALIFORNIA

B/CCS: Messrs. J. C. SNODGRASS
CHAS. T. MAY
G. C. BOND

• • • •

CAPTION

[3723]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

In the Matters of The Jupiter Corporation The Pure Oil Company,[1] *et al.*	Docket Nos. RI63-212, *et al.* G-16790, *et al.*

OPPOSITION OF TENNESSEE GAS PIPELINE CO., A DIVISION OF TENNECO INC., TO RENEWED REQUEST OF JUPITER CORPORATION FOR DISMISSAL OF TENNESSEE'S PETITION FOR ORDER DIRECTING COMPLIANCE WITH THE COMMISSION'S ORDERS

Tennessee Gas Pipeline Co. (Tennessee), a Division of Tenneco Inc., hereby opposes the renewed request of Jupiter Corporation (Jupiter) for dismissal of Tennessee's petition for order directing Jupiter and Union Oil Company of California to comply with the Commission's orders in the above-styled proceedings.

Jupiter's renewed request is based upon (1) the order issued by Judge Schwartz of the Circuit Court of Cook County, Illinois, with regard to the "somewhat similar court proceeding" pending in that court and (2) the Commission's recent order in *Merle M. Rowan, et al. v. Allied Chemical Corporation*, Docket No. RI68-138, issued January 17, 1968.

However, since the filing of the instant request by Jupiter, the United States District Court for the Northern District of Illinois, Eastern Division, has, by order issued January 31, 1968, in No. 67 C 1398, stayed the proceeding which Jupiter

[1] Union Oil Company of California is now successor in interest to The Pure Oil Company.

has instituted in that court "pending [3724] a resolution by the Federal Power Commission of all matters presented to it under Docket No. RI63-212 and G-16790." Copies of the District Court's minute order and its Memorandum of Decision are attached hereto.

With regard to the *Rowan* case, it should be noted that the Commission there deferred to the court because it regarded the issues presented as concerned solely with contract interpretation. The issues in the Jupiter-Union-Tennessee controversies in the instant proceeding, on the other hand involve, to quote the District Court, "much more than a mere contractual dispute. Both controversies involve questions of interpretation of Federal Power Commission orders and questions involving rate making functions and jurisdiction of the commission." (See Memorandum of Decision, *supra*, p. 1). In any case, as the District Court further pointed out, "The applicability of [the Rowan] decision to the particular circumstances involved in the matter now pending before this court should be determined by the commission." (Memorandum of Decision, *supra*, p. 3).

WHEREFORE, it is respectfully submitted that Jupiter's renewed request for dismissal of Tennessee's petition in the above proceedings should be denied.

Respectfully submitted,

TENNESSEE GAS PIPELINE COMPANY,
A division of Tenneco Inc.

By MELVIN RICHTER
Melvin Richter

(3724)

Jack Werner
Melvin Richter
Littman and Werner
1001 Connecticut Avenue
Washington, D. C. 20036

Harry S. Welch
W. C. Braden, Jr.
Roy C. Alletag
P. O. Box 2511
Houston, Texas 77001

Attorneys for Tennessee Gas Pipeline Company, a Division of Tenneco Inc.

February 6, 1968

[3725]

District of Columbia : ss

Melvin Richter, being first duly sworn according to law, says that he is an attorney for Tennessee Gas Pipeline Company, a Division of Tenneco Inc.; that he has read the foregoing document of said Company and is familiar with the contents thereof; that he has executed the same for and on behalf of said Company with full power and authority so to do; and that the facts set forth therein are true and correct to the best of his knowledge, information and belief.

MELVIN RICHTER
Melvin Richter

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia, this 6th day of February, 1968.

LOUISE H. PARMER
Louise H. Parmer
Notary Public

My Commission Expires:
February 28, 1970

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure. Dated at Washington, D. C. this 6th day of February, 1968.

MELVIN RICHTER
Melvin Richter

Of Counsel for Tennessee Gas Pipeline Company, a Division of Tenneco Inc.

• • • •

CAPTION

[3728]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Declaratory Order — Rates (Transportation Service)
Before Commissioners: Lee C. White, Chairman;

L. J. O'Connor, Jr.,
Charles R. Ross,
Carl E. Bagge, and
John A. Carver, Jr.

THE JUPITER CORPORATION	Docket Nos.
UNION OIL COMPANY OF CALIFORNIA	RI63-212
PHILLIPS PETROLEUM COMPANY and	G-16790
KERR-MCGEE CORPORATION	RI68-111

ORDER ON PETITIONS FOR DECLARATORY RELIEF
(Issued April 3, 1968)

This proceeding involves still another chapter in the long history of this Commission's regulation of the just and

reasonable rates to be charged by Jupiter Corporation (Jupiter) for certain operations it has been and is conducting in connection with a pipeline it owns and operates between the Rollover Field, offshore Southern Louisiana, and the facilities of Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee) onshore in Louisiana. By our order of June 28, 1966, approving a Jupiter proposed settlement in Docket No. RI63-212 we had thought we had brought this long litigation to an agreed and reasonable conclusion. The petitions filed in the above-captioned proceedings by Phillips Kerr-McGee and Tennessee[1] show that we were overly optimistic in this belief.

Jupiter, through its pipeline facilities, performs a number of separate functions coming within the aegis of this Commission's [3729] jurisdiction. It purchases gas from Phillips Petroleum Company and Kerr-McGee Corporation (Phillips Kerr-McGee), which it transports onshore and resells to Tennessee. It also for a fee transports to the Tennessee pipe line facilities gas which Union Oil Company of California (Union), as successor to the Pure Oil Company (Pure), sells to Tennessee. Finally, and this is the root of the present contest, it transports through these same facilities a limited amount of condensate and heavy hydrocarbons, which though part of the gas stream as delivered to Jupiter by Phillips Kerr-McGee and Union, are not part of the gas sales to Tennessee but are separated out and returned to the producers.

Pursuant to our decision of August 11, 1965 in Opinion No. 470, *Phillips Petroleum Co., et al.,* Dockets No. G-16611,

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[1] Petition of Phillips Kerr-McGee for Order Directing The Jupiter Corporation to Pay the Filed Rate for Purchased Gas, filed August 30, 1967, Petition of Tennessee for Order Directing Jupiter and Union to comply with Commission Orders filed June 1, 1967.

et al., 34 FPC 486, Phillips Kerr-McGee was certificated to make its sale of natural gas to Jupiter at an initial price of 18.5 cents per Mcf, and Jupiter, pending the outcome of the in-progress Section 5 rate proceeding in Docket No. RI63-212, was granted a modified temporary certificate authorizing it to charge Tennessee no more than 20.9 cents per Mcf for the gas it obtains from Phillips Kerr-McGee and resells to Tennessee.[2] In an order of November 27, 1962, Union's predecessor Pure, as part of a settlement of its company wide rate case, had been authorized to charge for the gas it sold to Tennessee under its Rate Schedule No 40, 16.75 cents **[3730]** plus transportation.[3] The 16.75 cent base rate has subsequently, been increased, subject to refund in Docket No. RI68-40, to 17.75 cents, effective January 8, 1968.

The appropriate just and reasonable rate for Jupiter's transportation of gas for Pure and the determination of the just and reasonable price Jupiter should charge for the

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[2] Previously, Jupiter had charged Tennessee 22.8333 cents per Mcf for the gas pursuant to a temporary certificate issued on May 24, 1962.

[3] In the order approving the settlement the Commission stated (28 FPC at 891) "[Pure] proposes a settlement rate of 16.75¢ per Mcf, plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein. We believe that under all the circumstances the proposed settlement rate for this sale should be approved."

In a footnote to the rate schedule in the Appendix annexed to the Commission's order, the "16.75¢ Trans." settlement price is further explained. The note indicates that Jupiter was then charging Pure for transportation from the field 10 miles offshore to Tennessee's main line onshore 4.0¢ per Mcf for the first 62.5 MMCFD and 3.0¢ per Mcf for the remainder. It goes on to say "These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, its successors or assigns. Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure."

gas it sold to Tennesse were in issue in Docket No. RI 63-212. On January 5, 1966, Presiding Examiner Ellis issued an Initial Decision holding that both of these transactions were subject to the Commission's jurisdiction, and fixing just and reasonable rates for such operations (See 35 FPC 1095-1133). Prior to decision on exceptions by the Commission, Jupiter filed a proposed settlement, which as described in the Commission's order of approval, proposed, inter alia, that it (1) would file a rate schedule "providing for a charge of 1.0¢ per Mcf (at 15.025 psia) for transporting gas for Union" and (2) Jupiter would file a supplement to its rate schedule for **[3731]** its sale to Tennessee "providing for a contractual sale price to Tennessee of 19.5¢ per Mcf for the remaining portion of the current pricing period and for the next four year price redetermination period." (35 FPC at 1092). Following acceptance of the settlement Jupiter made these filings.

The present questions arise out of another feature of Jupiter's settlement offer relating to its claimed rights to separate reimbursement from Union and Phillips Kerr-McGee for the transportation of liquids for these producers as well as certain other services it assertedly performs for the producers with respect to this portion of the gas stream which never gets to Tennessee. In its settlement proposal Jupiter stated its offer was made "with an express understanding that Jupiter does not waive its rights with respect to the collection from Phillips Kerr-McGee and Union of compensation for services Jupiter performs in transporting, separating or storing those producers' condensates and liquefiable hydrocarbons." (35 FPC at 1092) In their responses to Jupiter's settlement offer Phillips Kerr-McGee objected to the proposed settlement to the extent that it would in effect reduce its firm rate of 18.5¢ per Mcf by requiring Phillips Kerr-McGee to reimburse Jupiter for the

service of transporting and separating the condensate contained in the gas stream. Contending that under their contracts with Jupiter such operations were to be without charge, Phillips Kerr-McGee stated that there was no reason for them to revise their contracts with Jupiter to provide additional reimbursement for Jupiter. Union, in response to the settlement agreement, also objected to any proposal which might require it to contribute any sums to Jupiter for the purposes of alleviating the economic difficulties Jupiter envisioned might result from effectuation of the examiners' decision.

In the light of these objections, the Commission, in approving the settlement, expressly stated (35 FPC at 1094):

> Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips Kerr-McGee of compensation for transporting, [3732] separating or storing those producers' condensates and liquifiable hydrocarbons and the producers answers on that point does not present any issue to be determined at this time. Any contractural arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to the Commission.

Phillips-Kerr-McGee was not satisfied with this resolution of the issue. It filed an application for rehearing objecting to the statement quoted above to the extent it implied that there were conractural arrangements between Jupiter and the producers relating to transportation and processing of condensate or liquifiable hydrocarbons, remaining open for negotiation. Phillips reiterated its claim it had contracted for free services with respect to these operations and that this arrangement remained in force. The Commission, in an "Order Clarifying Prior Order and Denying Rehearing", issued August 22, 1966 (36 FPC 495), stated:

> The quoted sentence neither implies that further contractural arrangements are open for negotiations nor requires that further negotiations be held. That sentence merely indicates that we are not now determining the claimed rights of any party on this matter . . .

In conformity with the Commission's settlement order, Jupiter filed changes in its FPC Gas Rate Schedules Nos. 7 and 8 for the transportation of gas "delivered to Tennessee . . . for the account of Union" and for sale of gas (purchased from Phillips-Kerr-McGee) to Tennessee. On December 9, 1966, the Commission's Secretary wrote Union pointing out that "the transportation charge of the Jupiter Corporation applicable to gas sold under your FPC Gas Rate Schedule No. 120 was reduced to 1.0¢ per Mcf, effective May 15, 1966," and that Union in its settlement had "agreed to make the necessary filing to reflect any change in such transportation charge . . ." He requested that Union accordingly make the requisite filing. However, Union, by telegram to the Commission Secretary of December 16, 1966, "respectfully declined" to do so. Union contended therein [3733] that Pure's settlement, as approved by the Commission, provided for a fixed payment by Tennessee to Union "plus the charges actually paid by Pure (now Union) to Jupiter", and that "inasmuch as Union was not a party or a participant to the Jupiter settlement proceeding the settlement and approval thereof did not modify Union's contract with Jupiter or with Tennessee" . . . It indicated that Jupiter had submitted to it two invoices totaling the full transportation rate originally charged prior to the Jupiter settlement, and that in view of the Commission's order in the Pure settlement, alledgedly approving the total transportation charge as part of Tennessee's rate, it would not be proper to reduce the rate. This matter has not yet been resolved by the Commission.

The present proceeding comes to us as a result of the petitions filed by Tennessee and Phillips-Kerr-McGee which are directly related to two pending court proceedings initiated by Jupiter. In one case, filed by Jupiter in the U. S. District Court for the Northern District of Illinois, against Union, in which Tennessee has been named as a third party defendant by Union, Jupiter is seeking a determination that the proper rate for all of the services it performs under its contract with Union is 3.4¢ per Mcf. and Union is arguing that it this is true it is entitled to collect the entire sum from Tennessee in addition to its base rate of 17.75¢ per Mcf.[4] In the other case filed by Jupiter against Phillips and Kerr-McGee in the State Circuit Court for Cook County, Illinois, Jupiter is contending that under its contract with those producers it is obligated to pay only 17.1c per Mcf in lieu of the certificated price of 18.5¢ per Mcf.[5] In both cases, as here, Jupiter asserts its contract rights as against the producers were not impaired by the settlement order approved by the Commission since all sums due it under the contracts, over and beyond the 1.0 cent authorized for the transportation and sale of gas in the settlement, **[3734]** can and must be deemed due it as compensation for the services it performs for the producers with respect to condensate and liquifiable hydrocarbons. Both Phillips-Kerr-McGee and Tennessee have filed motions in the judicial proceedings to dismiss or stay the actions on grounds that this Commission has primary jurisdiction over the subject mat-

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[4] *The Jupiter Corporation* v. *Union Oil Company of California*, Civil Action No. 67C1398, and *Union Oil Company of California* v. *Tenneco, Inc., id.*

[5] *The Jupiter Corporation* v. *Phillips Petroleum Company and Kerr-McGee Corporation*, No. 67L12177.

ter, and the Tennessee and Phillips-Kerr-McGee petitions here in issue seek to have us exercise such jurisdiction.[6]

For convenience, we have treated our analysis below of the Phillips-Kerr-McGee—Jupiter—Tennessee transaction separately from that involving Union—Jupiter and Tennessee.

The Phillips-Kee-McGee—Jupiter—Tennessee Transaction

We believe it beyond dispute that, pursuant to the final orders of this Commission in Opinion No. 470 and approving the Jupiter settlement, as fully described above, Jupiter must pay Phillips-Kerr-McGee 18.5 cents (at 15.025 psia) for each Mcf of natural gas it purchases from those producers and must charge Tennessee no more than 19.5 cents for each Mcf of gas which the latter purchases from Jupiter, at the tail gate of Phillips' extraction plant downstream on Tennessee's line from the point at which Tennessee physically takes delivery from Jupiter.[7] We do not understand Jupiter to disagree insofar as its sale price to Tennessee is concerned.

[3735]

Jupiter's claim in effect is that it is entitled to offset the payments it is required by Opinion 470 to make to Phillips-Kerr-McGee for the gas purchased from these producers, by the sums allegedly due it from Phillips-Kerr-McGee for the

[6] On January 31, 1968, the U. S. District Court issued an order staying all further court proceedings pending a resolution by this Commission of the matters raised in the present pleadings. On January 12, 1968, the state court denied Phillips-Kerr-McGee's motion for stay.

[7] The volumes of gas which Tennessee receives are devoid of condensates and liquifiable hydrocarbons, the former having been removed from the gas stream at Jupiter's separating plant and the latter extracted at Phillips' plant. (Docket No. RI63-212, Transcript 84, 85.)

transportation, separating and storing of condensates which are separated from the gas stream eventually sold to Tennessee and returned to the producers. The producers deny Jupiter is contractually entitled to any recompense for such activities.

We do not believe any public interest objective would be achieved by our attempting to resolve such contractural issues. This is an area in which we possess no special expertise which would be applicable in any subsequent judicial proceedings. See *Texas Gas Transmission Co. v. Shell Oil Co.*, 363 U.S. 263 (1960); *Pure Oil Co. v. F.P.C.*, 299 F. 2d 370 (CA7, 1962). Moreover, in the present situation any judicial remedy available to Jupiter may well be a matter of equity rather than of law. It is, we believe, sufficient here to note that, under the Natural Gas Act, transportation of such portions of the natural gas stream received by Jupiter from Phillips-Kerr-McGee, but not resold to Tennessee, is just as much subject to our jurisdiction as the remaining portion of the gas stream, even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids. See *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882, 888 (CA5, 1957), certiorari denied 355 U.S. 930; *Panhandle Eastern Pipeline v. F.P.C.*, 359 F. 2d 675, 682-683 (CA8, 1966); *Louisiana Public Service Commission v. F.P.C.*, 359 F. 2d 525 (CA 5, 1966), certiorari denied 385 U.S. 833. This means that, even if it were to be determined that Jupiter was contractually entitled to reimbursement for the transportation services it provides for Phillips-Kerr-McGee, it would not be entitled to payment therefor unless and until it secures a certificate for such transportation at an appropriate rate. It is equally clear that, contrary to Jupiter's apparent claim, any charge for performing jurisdictional transportation activities for Phillips-Kerr-McGee would have to be

measured by the approximate five percent of the gas stream [3736] received from those producers which is not sold to Tennessee rather than to the total volumes of the stream.[8]

It is recognized that, in addition to the transportation performed for the jurisdictional sales, Jupiter claims the right to payment under its contract for other services of a non-jurisdictional nature. In order to facilitate further administrative proceedings it is to be hoped, therefore, that any judicial determination that Jupiter is, as a matter of private obligation, entitled to any payments by Phillips-Kerr-McGee would segregate any amount due for said transportation from any other obligations to Jupiter the producers may be found to have.

The Union — Jupiter — Tennessee Arrangement

Here we have a more complex situation and one which, insofar as it involves disagreement as to the interpretation of our orders, clearly requires Commission guidance. The problem is a twofold one, since it involves not only Jupiter's relations with Union, dealt with in the 1966 settlement of Jupiter's rate case, but Union's rate for the sale of gas to Tennessee, as fixed by the 1962 rate settlement of Pure, Union's predecessor.

There can be no real dispute with the fact that the presently authorized rate for the transportation service Jupiter performs in bringing the gas Union has sold to Tennessee to the Tennessee main line onshore is 1.0 cent per Mcf. Not only is this the unequivocal holding of our order of June 28, 1966, but, consistent therewith, Jupiter filed a change in its Rate Schedule No. 7, effective May 15,

[8] It is clear that in fixing this price, the one-cent per Mcf settlement charge would not necessarily pertain. As indicated above, this settlement applied only to the transportation of gas redelivered to Tennessee.

1966, expressly so providing. Union's claim that the Commission's order is not binding on it because it was not a party to the Jupiter rate case is devoid of merit. Union (for its predecessor Pure) was, or should have been well aware of **[3737]** the case from its initiation;[9] its decision not to intervene and participate as a party was its own. Moreover, with special reference to the settlement agreement, Union was not only advised both of the settlement offer, and a prior one, but filed comments thereon with the Secretary of this Commission.[10] It is true that in these comments Union objected to the settlement (as did Phillips); but if it did not like the result (and if the result in part injured Union) it was free to seek rehearing and court review. It chose not to do so.

The other facet of Union's argument is equally lacking in substance. The Pure rate settlement cannot, as Union apparently would have it, be construed as fixing a rate for the sale of gas to Tennessee at a fixed price, plus the cost not only of transporting this gas, but the part of the gas stream initially received by Jupiter from Pure but never redelivered to Tennessee. As indicated in footnote 3, supra, the body of the Commission's order approving the Pure settlement expressly refers to "that amount [Pure] actually has to pay for transportation of the gas onshore." And while neither the original contract under which Pure sold gas to Tennessee, its rate settlement agreement, which had been submitted for the Commission's approval, or the Appendix to the Commission's order, in terms, expressly characterizes the **[3738]** transportation involved as the transportation of the gas[11] actually delivered to Tennessee.

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[9] Pure was served with a copy of the Commission's order, issued December 5, 1962, instituting the investigation of Jupiter's rates.

[10] Union's letters, filed April 15, 1966, and June 2, 1966.

[11] Contained in Supplement No. 9 to Union's FPC Gas Rate Schedule No. 120, filed December 26, 1962.

there is nothing in the language utilized which requires or suggests any other construction. It would be a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting onshore that part of the gas stream which Tennessee does not receive, but which is, instead, returned by transporter to the producer. No such obligation can be spelled out, or even implied, from the orders or underlying contracts in issue here.

As in the case of the Phillips-Kerr-McGee transaction, we see no reason, at this time, to attempt to resolve any contractual issue which may exist between Union and Jupiter as to the latter's right to compensation for services allegedly performed for Union, with respect to that part of the gas stream Jupiter physically receives from Union but which is not purchased from Union by Tennessee. Any such obligations are totally unrelated to the price Union may charge Tennessee as part of its filed rate; neither Jupiter nor Union have asked us to pass upon Jupiter's alleged rights to additional compensation from Union. As in the case of Phillips-Kerr-McGee, any transportation of condensates or hydrocarbons Jupiter performs for Union over and above the transportation of the gas it delivers to Tennessee, will itself involve jurisdictional transportation subject to certification and rate regulation by this Commission, and the appropriate rate for any such transportation would relate solely to the portion of the gas stream not redelivered to Tennessee. Thus here too, we would hope and expect any judicial determination of any Jupiter entitlement to reimbursement as a matter of private law would segregate the amounts attributable to such jurisdictional activities (which would then be subject to regulation by this Commission) from any amounts due for non-jurisdictional services.

Accordingly, the Commission finds and concludes:

(A) Union is, and since May 15, 1966, has been, obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's FPC Gas Rate Schedule No. 7.

[3739]

(B) Union is, and since May 15, 1966, has been, authorized to charge Tennessee no more than 1.0¢ per Mcf over and above its base rate under Union's FPC Gas Rate Schedule No. 120.

(C) Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latters' prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56, respectively.

(D) Jupiter is, and since May 15, 1966, has been, authorized to charge Tennessee 19.5¢ per Mcf for the gas sold by Jupiter to Tennessee under Jupiter's FPC Gas Rate Schedule No. 8.

By the Commission.
(S E A L)

Kenneth F. Plumb,
Acting Secretary.

*   *   *   *

CAPTION

[3741]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY and KERR-MCGEE CORPORATION	Docket Nos. RI63-212 G-16790 RI68-111

APPLICATION BY UNION OIL COMPANY OF CALIFORNIA FOR REHEARING OF ORDER ON PETITIONS FOR DECLARATORY RELIEF

COMES NOW, Union Oil Company of California (Union), pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules of Practice and Procedure, and files this application for rehearing of the Commission's Order in the above proceedings issued April 3, 1968. Union is a party to the proceeding in Docket Nos. RI63-212 and G-16790 by virtue of the "Petition of Tennessee Gas Pipeline Company, a Division of Tenneco Inc., for an Order Directing Jupiter Corporation and Union Oil Company of California to comply with Commission Orders in the above Proceedings" which was filed with the Commission on June 1, 1967. A copy thereof was served on Union with the Commission's letter dated June 13, 1967. Union's answer to the said Petition was filed with the Commission on June 28, 1967 and said answer is hereby incorporated herein by this reference. Union is aggrieved by the aforesaid order of the Commission issued April 3, 1968 in the respects hereinafter set forth. In support of the within application for rehearing, **[3742]** Union would respectively show as follows:

In Footnote [3] (memo, page 3) of its Order issued April 3, 1968, the Commission placed heavy, but unwarranted emphasis on its own language used in summarizing The Pure Oil Company's (Pure's)[1] Settlement Proposal in its order approving Pure's settlement in Docket Nos. G-16790, *et al.*, (28 FPC at 891). Insofar as it relates to Pure's FPC Gas Rate Schedule No. 40 (now Union's FPC Gas Rate Schedule No. 120), Pure's *original* Settlement Proposal provided for a rate of "16.75 cents, plus transportation", with a footnote as quoted by the Commission in its order. However, by an Amendment to Settlement Proposal subsequently filed with the Commission, Pure further clarified its proposal regarding the subject transaction as follows:

" IV.

As to the sale under Rate Schedule 40, Pure proposes to file a contract amendment which will provide for:

1. A base rate of 16.75¢ per Mcf at 15.025 psia, *plus reimbursement of the actual payments Pure makes to Jupiter Oil Corporation for transportation.*

2. Removal of the favored nations and price redetermination clauses from the contract and substitution in lieu thereof 1¢ per Mcf fixed escalation on November 1, 1966 and November 1, 1970.

3. Extend the period for make-up of gas paid for but not taken to five (5) years." (Emphasis supplied)

[3743]

It is therefore submitted that Pure at no time differentiated between the "transportation of gas onshore" and the "transportation" as provided in the Hydrocarbons Gathering and

[1] Union Oil Company of California succeeded to the interest of The Pure Oil Company on July 16, 1965.

Separating Agreement dated January 2, 1957 between Union and The Jupiter Corporation (Jupiter), which agreement is on file with the Commission as Jupiter's FPC Gas Rate Schedule No. 7. It is thus clear that the supplied adjective, "gas", was a creature of the Commission's concoction and has formed the predicate of all of its handlings of the parties' rights and obligations, eventually, as the Commission would have it, to Union's economic detriment.

II.

The Commission also quotes the footnote to Pure's rate schedule here in question which was incorporated as part of Pure's original Settlement Proposal and in the Appendix annexed to the Commission's order which, in pertinent part, reads as follows:

> "* * * Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure." (Memo, p. 3)

It is abundantly clear that this footnote stated Pure's never-disputed intent to reduce Tennessee's costs as reflected in Pure's Commission-approved filed rate to the extent, if any, that Pure's actual payments to Jupiter under the parties' Hydrocarbon Gathering and Separating Agreement were ultimately reduced. It is equally clear that Presiding Examiner Ellis understood this intent when he stated, in part, **[3744]** as follows at pages 46-47 of his initial decision issued January 5, 1966 in Docket Nos. RI63-212, *et al.*:

> "While Pure is not a party here, and may not be aware of this proceeding, its undertaking carried forward into the Commission's order on its rate settlement, as quoted on page 11 above, is clear and indubitable that if and when Jupiter's 3.4-cent rate *reduces* for any reason, the *benefit* will pass on to Tennessee and will necessarily affect Tennessee's cost of service and have its eventual effect on Tennessee's

resale price and the consumers' costs. For completeness of the record it may be appropriate to suggest that the Secretary send a copy of the order here subjoined to the Pure Oil Company at its recorded address. Finally, it hardly seems necessary also to incorporate in the order an enjoinder that Tennessee no longer continue to pay whatever price is invoiced to it (confessedly assuming it to be correct, 6T912), but shall take care to adjust its payments according to the change in Jupiter's rate.

"This procedural refinement is essential if the result of the proceeding is to benefit consumers. The point is the rate being altered by the attached order is Jupiter's rate to Pure, and the rate order does not change Tennessee's costs or the consumers' burden until Pure does in fact pass the rate *benefit* on to its customer, Tennessee. Pure's rate to Tennessee is not technically in this case, but in view of the undertaking quoted, as cited above, *there is no reason to doubt that the benefit will be transferred as soon as it occurs*, nor to doubt that it will create its reaction in Tennessee's cost of service and eventually in Tennessee's rates, leading to a reduction in consumers' costs.

• • •

"(c) The change is not of concern to Jupiter or harmful to it — Pure is still the contracting party bound to pay Jupiter's price. **[3745]** Pure has merely indemnified itself by getting agreement from Tennessee, as its customer, to pay or receive the effect of any change in this one element of Pure's costs. As such, agreements of this kind are quite common, as in the case of price adjustment clauses for changes in cost of fuel or of purchased gas, or in any many outright "cost of service" rates where the entire rate goes up or down as the costs change. * * *" (Emphasis supplied)

The key words in the above-quoted statement are "reduces" and "benefit". It is submitted that the Commission's Order, as it may affect Union, neither "reduces" Union's total payments to Jupiter nor is it a "benefit" to Union.

(3745)

Quite to the contrary, the Commission would have Union reduce its filed rate to Tennessee by a substantial amount, while leaving Union in the awkward and inequitable position of paying Jupiter more than Union receives from Tennessee contrary to the intent of Tennessee, Union (Pure) and Jupiter as expressed in the various written agreements between the parties. This inequity is underscored by the fact that the Commission has indicated in its order issued April 3, 1968 that "both parts" of Jupiter's Hydrocarbon Gathering and Separating Agreement, as well as the "rates" chargeable therefor are jurisdictional in the following words:

> "* * * (A)ny transportation of condensates or hydrocarbons Jupiter performs for Union over and above the transportation of the gas it delivers to Tennessee, will itself involve jurisdictional transportation subject to certification and rate regulation by this Commission, and the appropriate rate for such transportation would relate solely to the portion of the gas stream not redelivered to Tennessee. * * *" (Memo, page 11)

[3746]

The direct and only effect of the Commission's order would appear to be a clear and unequivocal reduction in Union's filed rate which was approved by the Commission's final and condition-fulfilled order issued in 1962. All parties have performed under the multi-contractual arrangements and certifications without challenge from the Commission or others for a period of approximately six years following the Pure Settlement and its approval by the Commission.

III.

In dealing with Union's contention (which is here reiterated) that it was not a party to the Jupiter Settlement proceedings in Docket Nos. RI63-212, *et al.*, the Commission

states that Union "was, or should have been, well aware of the case from its initiation," and such contention on the part of Union "is devoid of merit." It is hereby submitted that the matters now being dealt with in the Commisson's order issued April 3, 1968 were not in issue in the Jupiter proceeding. Had Union elected to intervene in those proceedings as the Commission now suggests, it would have had no legitimate role to play other than that of a customer or Jupiter who, Union submits, is a part of the public that the Commission purports to protect in its regulatory activity. If Union had become an intervenor, it would have expected to support the contract terms comprising Jupiter's Rate Schedule No. 7 upon which "surgery" was being performed by the Commission.

The Commission could have brought about Union's **[3747]** Participation in the Jupiter proceeding by consolidating Union's FPC Gas Rate Schedule No. 120 with such proceedings and making both Union and Tennessee (merely an intervenor) parties to the proceedings as respondents. The Commission elected not to take this action. This inaction on the part of the Commission, coupled with an order affecting Union's vested rights, but without a hearing (although repeatedly requested by Union over a period in excess of a year) is a clear denial of due process to Union. The suggestion in the Commission's Order of April 3, 1968 that "If Union did not like the result (and if the result in part injured Union), it was free to seek rehearing and court review" (Memo, page 10) is contrary to the express language of Section 19(a) of the Natural Gas Act which provides that the right to a rehearing is only available to a "party" to the proceeding. Union was not a party to the proceeding and had no right to seek rehearing and court review.

(3747)

Moreover, the Commission in its "Order Clarifying Prior Order and Denying Rehearing" issued August 22, 1966, specifically declined to decide the issue upon which Union's participation in Jupiter's settlement proceeding would have been predicated and upon which appeal could have been taken therefrom.

IV.

The Commission's holding that Union's argument is "lacking in substance" when it contends that its settlement [3748] rate to Tennessee is comprised of a "fixed rate", plus *all* costs for transportation regardless of whether Tennessee ultimately gets the hydrocarbon product, is in error and is self-serving to the Commission's disposition of these several matters *after the fact* of having unequivocally approved the settlement proposed by Pure. It is submitted that the "woof and warp" of the Commission's weave is its unfounded contention that *Pure proposed* to pay any amount for the service of transporting "gas ashore." The Commission in its order approving Pure's settlement stated in the body thereof that "Pure has agreed to charge only that amount it actually has to pay for the transportation of gas onshore." (Memo, page 3) As set forth hereinabove, Pure did not so propose in its settlement Proposal or the Amendment thereto, or otherwise limit its proposal to "gas" transportation only. It is submitted that, with this fiction for all time dispatched, the Commission must reach the irresistible conclusion that Union is entitled to receive its total filed rate from Tennessee, and that Tennessee is obligated to pay said rate until such time as the Commission deems it appropriate to fix a *total* rate for all services performed by Jupiter for Union which would, in turn, be reimbursed to Union by Tennesee. To hold otherwise would severely shake the gas-producing industry's faith in Commission-approved settlements.

In connection with the contractual obligation of Tennessee to reimburse Union for the latter's payments to [3749] Jupiter, the Commission states that:

> "It would be a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting onshore that part of the gas stream which Tennessee does not receive, but which is, instead, returned by transporter to the producer. No such obligation can be spelled out, or even implied, from the orders or underlying contracts in issue here." (Memo, page 11)

It is respectively submitted that the Commission was aware of the services to be performed by Jupiter for Union as provided in the Hydrocarbons Gathering and Separating Agreement at the time of the Commission's order approving the Pure Settlement Proposal, which proposal made the payment for such services fully reimbursible by Tennessee as part of Union's filed rate. It is also submitted that the "arrangement" is not "peculiar" inasmuch as the practice is quite prevalent in the area of this transaction and is presently under the Commission's investigation in Docket No. R-338.

CONCLUSION

WHEREFORE, Union respectfully urges that rehearing be granted of said Order of April 3, 1968, and that upon rehearing said Order be modified consistent with the grounds upon which [3750] this application is based.

Respectfully submitted,

UNION OIL COMPANY OF
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CAPTION

[3754]

UNITED STATES OF AMERICA
BEFORE THE FEDERAL POWER COMMISSION

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY AND KERR-MCGEE CORPORATION	RI63-212 G-16790 RI68-111

PETITIONS FOR REHEARING OF THE JUPITER CORPORATION OF ORDER ON PETITIONS FOR DECLARATORY RELIEF

The Jupiter Corporation (Jupiter) here files its Petition For Rehearing of the Order On Petitions For Declaratory Relief issued herein on April 3, 1968.

I. The Order

The Order in question relates to a number of sub-issues involved in the separate controversies (1) between Jupiter and Phillips Petroleum Company and Kerr-McGee Corporation (PKM), and (2) between Jupiter and Union Oil Company of California (Union).

Because Jupiter believes the Commission's Order is not wholly clear in several respects, as explained below, Jupiter's request for relief herein is framed in part as a request for clarification, and Jupiter will begin this Petition for Rehearing by stating what *may* be the Commission's position in the subject Order.

It appears that the Commission has recognized at least three activities performed by Jupiter:

[3755]

(1) The purchase and sale for resale, and or transportation, of natural gas which is ultimately delivered to Tennessee Gas Pipeline Company (Tennessee) and transported by Tennessee for ultimate consumer consumption.

(2) The transportation of liquid condensates.*

(3) Other services performed by Jupiter for Union and PKM, including the separation and storage of liquid condensates.

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* For clarity throughout this Petition for Rehearing, as recognized by the Commission in its Order (Mimeo., p. 7, fn. 7), Jupiter will refer to those components of the well stream which are not liquids at ordinary temperatures and pressures and which are extracted at Phillip's processing plant as "liquefiable hydrocarbons" or "liquefiables", and to those components of the well stream which are liquids at atmospheric temperatures and pressures and which are separated by Jupiter's mechanical separator, first for measurement on the offshore platform and again on shore for delivery to the producers as "liquid condensates" or "liquids".

The first part of the Order which is not entirely clear arises out of the Commission's statement with respect to the PKM transaction, at page 8 of the Order:

> It is, we believe, sufficient here to note that, under the Natural Gas Act, transportation of such portions of the natural gas stream received by Jupiter from Phillips-Kerr-McGee, but not resold to Tennessee, is just as much subject to our jurisdiction as the remaining portion of the gas stream, even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids. See *Deep South Oil Co.* v. *F.P.C.*, **[3756]** 247 F.2d 882, 888 (CA5, 1957, certiorari denied 355 U.S. 930; *Panhandle Eastern Pipeline* v. *F.P.C.*, 359 F.2d 675, 682-683 (CA8, 1966); *Louisiana Public Service Commission* v. *F.P.C.*, 359 F.2d 525 (CA5, 1966), certiorari denied 385 U.S. 833. This means that, even if it were to be determined that Jupiter was contractually entitled to reimbursement for the transportation services it provides for Phillips-Kerr-McGee, it would not be entitled to payment therefor unless and until it secures a certificate for such transportation at an appropriate rate.

And at page 11, with respect to the Union transaction, the Order states:

> As in the case of Phillips-Kerr-McGee, any transportation of condensates or hydrocarbons Jupiter performs for Union over and above the transportation of the gas it delivers to Tennessee, will itself involve jurisdictional transportation subject to certification and rate regulation by this Commission, and the appropriate rate for any such transportaton would relate solely to the portion of the gas stream not redelivered to Tennessee.

Jupiter of course agrees with the Commission's view that the Commission has rate and certificate jurisdiction over

the sale and/or transportation of natural gas and that the Commission does not have rate and certificate jurisdiction over the services referred to as item (3) in the list at the beginning of this Petition. However, the two quotations above, from the Commission's Order could be interpreted to state that the Commission has jurisdiction (assuming interstate commerce) to:

[3757]

a. Grant (Certificate) or deny authority to construct facilities which will carry a combined gas and liquid condensate stream, including such capacity, if any, as might be "extra" in order to carry the liquid condensate portion of the stream.

b. Grant (Certificate) or deny authority to transport a natural gas stream which carries liquid condensate along with it.

c. Regulate the "rate" which is paid for the transportation of liquid condensates, whether such "rate" is contractually specified as such, or is in some other form, such as a contractual "spread."*

In addition, it appears that the Commission has not claimed jurisdiction to:

d. Regulate the price at which the liquefiable hydrocarbons (when separated) and the liquid condensate are sold.

Commission certificate jurisdiction, as listed in items a. and b. above, is not challenged by Jupiter, although Jupi-

* It is not apparent whether this authority is conceived to be a part of certification only, or by both certificate and rate proceedings, nor is the Commission's position apparent as to the relationship between this claimed "rate regulation" and the allocation of costs between gas transportation and liquid condensate and liquefiable hydrocarbon transportation.

ter is unable to ascertain from the subject Order the exact nature of this jurisdiction claimed by [3758] the Commission. Jupiter, however, does not believe that the certificate jurisdiction noted also grants the Commission the authority listed as items c. and d., above, and doubts that this is what the Commission's Order means to say.

Jupiter emphasizes that its above delineation of Commission position states what Jupiter believes the Commission *may* mean, but Jupiter is not certain it has correctly interpreted the Commission Order, particularly in view of the inconsistency of such interpretation with other recent Commission pronouncements, as explained below.

The second part of the Order which requires clarification relates to the fact that the Order may indicate that Jupiter has not made clear its position relative to its contractual relations with PKM, since Finding Paragraph (C) of the Order states that Jupiter is obligated to pay PKM 18.5 cents per Mcf under the PKM Rate Schedules. This is a reiteration of a sentence on page 7 of such Order, and does not negate or deny Jupiter's right to pay less, since on page 8 of such Order, the Commission states:

> Jupiter's claim in effect is that it is entitled to off-set the payments it is required by Opinion 470 to make to Phillips-Kerr-McGee for the gas purchased from these producers, by the sums allegedly [3759] due it from Phillips-Kerr-McGee for the transportation, separating and storing of condensates which are separated from the gas stream eventually sold to Tennessee and returned to the producers.

That quoted passage and finding paragraph may state a Commission position that the total revenues to which Jupiter is entitled under its contract with PKM is a composite of payment for (i) hauling gas, (ii) hauling condensate and (iii) performing other nonjurisdictional services, (i),

(ii) and (iii) each being separate pricing components. The PKM Rate Schedules, however, are the contracts between those companies and Jupiter, and Jupiter is firmly of the opinion, and believes it has demonstrated, that such contracts set the *maximum* price which Jupiter currently must pay to PKM, at 19.5 cents (the price the Commission now orders Jupiter to collect from Tennessee Gas Pipeline Company (Tennessee) less a contract price differential (or adjustment) which normally approximates 2.5 cents per Mcf. This is a unified contract, and unified differential, although Jupiter recognizes that the apparent difference in concept may be merely semantic. Further, Jupiter's above statement does not constitute a rejection of the Commission's *general* view, for *gas regulatory* purposes.

[3760]

Relative to Union, the same conceptual or semantic difference may exist, since Finding Paragraph A states that Union must pay Jupiter 1 cent per Mcf pursuant to Jupiter's Rate Schedule No. 7. Again, irrespective of the Commission's view of Jupiter's total revenues as a composite for a variety of services, with 1 cent per Mcf constituting the natural gas component, Jupiter's *contract* with Union provides for a charge which approximates 3.4 cents per Mcf, for the combined services. Again, this is not inconsistent with the Commission's *general* view, for *gas regulatory* purposes, since it seems likely that the fact the Commission limited Finding paragraph A to Jupiter's Rate Schedule indicates that that paragraph refers only to the *gas* charge under the Commission's past orders.

II. Jupiter's Possible Disagreement With The Order

In its Order, the Commission appears to possibly state (as discussed in Section I hereof) that the Commission has

jurisdiction to regulate the rate paid for the transportation of liquid condensate which is not sold to interstate pipelines (and thus is not sold to distributors and consumers of natural gas).

Jupiter doubts that this is a correct interpretation of what the Commission has said in the subject Order, since

if it were, it would be directly contradictory to the Commission's Proposed Statement of General Policy in Docket No. R-338. In its Notice of that Proposed Policy, issued February 5, 1968, the Commission stated, at page 2:

> We have reached a tentative conclusion that it might be preferable and sufficient for purposes of consumer protection, to allocate out of the cost of service applicable to other jurisdictional services the liquid transportation costs in pipeline cases, *leaving it to the pipelines to negotiate fair compensation from the owner of the liquids of the liquefiable hydrocarbons.* (emphasis added)

Thus, the Commission's proposed policy statement clearly states that the Commission will allocate pipeline costs between the natural gas, liquefiable hydrocarbons and liquid condensate "components", but that the Commission *will not* fix the compensation which the pipeline will receive for carrying the liquefiable hydrocarbons or the liquid condensates. The proposal to continue the present policy of not attempting to regulate the latter compensation (consistent with the fact the Commission does not attempt to regulate the price at which separated liquids or extracted liquefiables are sold) is appropriate on two grounds.

First, it is obvious that the liquid condensates (and liquefiables too, for that matter) which are extracted and retained by the producer, are not sold to or transported through the interstate pipeline, and thus do not burden the

[3762]

distributors and consumers of interstate gas. This is clear factually, and the Commission has recognized it in the subject Order herein, when it ruled that Union cannot pass on more than the 1 cent per Mcf *gas* charge to Tennessee, since it "would be a most peculiar sales arrangement" for Tennessee to pay for transporting "that part of the gas stream which Tennessee does not receive." Since the consumers will not be burdened, whatever the level of the charge for hauling liquids, so long as an appropriate cost allocation is made, there is no reason why the Commission should, or can, regulate such hauling charge.

Secondly, Jupiter believes that the Natural Gas Act limits the Commission's jurisdiction to natural *gas;* that those substances which are often entrapped and carried with gas, but in liquid form, are clearly not gas; and that the Commission therefore has no jurisdiction with regards to liquids. This not negate the power of the Commission to certificate facilities which a pipeline proposes to use to carry liquids, together with gas and liquefiables. Nor does it negate the power of the Commission to certificate the transportation of a gas-liquid stream, even though that stream carries liquids (and also includes liquefiables which are later removed from the stream). Nor does it negate the power of the [3763] Commission to fix a rate for transportation of the gas, including the technique of allocation of costs between the functions of gas, liquids and liquefiables transportation. But it does negate the power of the Commission to regulate the rate for which the liquids are carried and/or sold. However, such limitation, as noted above, does not harm or burden the consumers of gas, so that no need for such power exists.*

* Subsection II A, B and C hereof, below, will more fully explore why the Commission should not, need not and is not authorized to regulate the rate for the transportation of liquids.

Thus, it is apparent that the sentence summary, quoted above, from the Commission's proposed General Policy Statement, is consistent with the Commission's duty and authority. However, in the subject Juipter Order, the Commission *seems* to suggest that the Commission can and will regulate the level of the charge for hauling the liquids which do not get passed on to the consumer. Jupiter cannot be sure that such Order so states, however. At page 8 of the Order, for example, the Commission states that once Jupiter establishes its contractural right to payment, it must secure "a certificate for such transportation at an appropriate rate." This reference to rate may not be intended to suggest that the *Commission* would set the "appropriate" level, but may merely refer to an "appropriate" level set by contract and/or court ruling. Similarly, the Commission states, at page 11 **[3764]** of the Order, that the "transportation of condensates or hydrocarbons . . . will . . . involve jurisdictional transportation subject to certificate and rate regulation by this Commission." The reference to *rate* regulation may pertain to the allocation of costs in a pipeline rate case, as covered in the Commission's Statement of Proposed Policy, rather than to a direct setting of the liquid hauling (or sales) rates. Thus, Jupiter requests clarification in these respects.

Jupiter has heretofore also noted that it believes that the Commission's reference to an obligation of Union to pay Jupiter 1 cent per Mcf (Ordering paragraph A, p. 11) is limited to *gas*, and does not purport to refer to Jupiter's total contractural rights which may be judicially established. Similarly, Jupiter believes that the Commission's Ordering paragraph C (p. 12) has the same intent and limitation of scope, and does not purport to require Jupiter to actually now *pay* PKM 18.5 cents per Mcf, but instead indicates the amount of payment which the Commission regards as

"in-line" for regulatory purposes, but subject to PKM's contractural right to collect that amount which contractural question is before the Circuit Court of Cook County, Illinois.

Consistently with the above interpretation. Jupiter believes that the subject Order does not purport to now change Jupiter's present posture:

a. To continue to bill Union for the contractual rate of approximately 3.4 cents per Mcf and to pursue judicial remedies to collect same.

b. To continue to pay PKM at the rate of approximately 17 cents per Mcf, and to pursue efforts to judicially establish its right to pay no more than that amount, so long as its (Jupiter's) gas sale price to Tennessee is no more than 19.5 cents per Mcf.

The above interpretation of the Commission Order, however, still leaves the question of Commission intent and authority, *after* judicial determinations are reached in the litigation between Jupiter and PKM, and Jupiter and Union. Jupiter will now return to a more detailed description of that subject.

A. The Commission Need Not Regulate Liquid Hauling Rates

As noted above, the Commission may fully exercise its duties under the Natural Gas Act without undertaking to regulate the rates for transportation of liquids not delivered and sold to the interstate pipelines (and thus not sold to distributors and consumers). The support for this statement will be summarized in this subsection.

First and foremost, there is no need for the Commission to regulate the charge for transportation of liquid

condensates (or liquefiable hydrocarbons) or for the Commission [3766] to regulate the sale prices of liquid condensates (or liquefiable hydrocarbons), because the interests of the natural gas consumer are fully protected without such regulation. The primary guideline of most decisions concerning the jurisdiction of the Commission is protection for the natural gas consumer. In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), the Supreme Court stated that "the overriding congressional purpose (for the Natural Gas Act) was to plug the 'gap' in regulation of natural-gas companies resulting from judicial decisions prohibiting, on federal constitutional grounds, state regulation of many of the interstate commerce aspects of the natural-gas business". The court, therefore, held that the Commission had jurisdiction over the rate charged by an independent producer to an interstate pipeline for natural gas, because such a rate has "a direct and substantial effect on the price paid by the ultimate consumers" of natural gas. (347 U.S. at 682-683, 685)

This consideration is not present in the instant controversy because full protection of the natural gas consumer is accomplished and assured as long as the Commission has and exercises jurisdiction to (1) regulate the price paid by Tennessee to Union and to Jupiter; (2) regulate the maximum price paid for natural gas, by Jupiter to PKM; (3) regulate [3767] Jupiter's rates (or contract spread) for the transportation of *gas;* and (4) allocate Jupiter's pipeline cost of service among the natural gas, liquefiable hydrocarbon and liquid condensate components of Jupiter's activities, as proposed in General Policy Docket No. R-338, discussed above. As previously stated, and as stated in the subject Jupiter Order, the Commission has exercised its jurisdiction in these four areas, and Jupiter has no quarrel with the Commissions' authority to

exercise this described jurisdiction. In addition, this Commission has the power, through its certificate and abandonment approval authority, to limit the utilization for non-jurisdictional services of that facility capacity which has been dedicated to service for the natural gas consumer. Therefore, the Commission has adequate control to prevent Jupiter from attempting to use a greater proportion of its capacity for liquid condensate transportation, when that capacity is needed for transportation of natural gas, to the detriment of the producers, Tennessee or the natural gas consumers.*

[3768]

The extension of the Commission's jurisdiction further, to regulate the charge for transportation and/or the sale price of liquid condensates, will not add anything to the present protection of the natural gas consumer which is afforded by this Commission under the Natural Gas Act.

Even beyond the area of concern of the natural gas consumer, there will not exist any "attractive" regulatory gap, or, for that matter, any regulatory gap (See *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-22, 27-28 (1961); *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 467-474 (1950).), if liquid condensate is held not to fall within the definition of "natural gas" under the Natural Gas Act: if these liquid condensates are in interstate commerce, the Interstate Commerce Commisson has jurisdiction over

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* Jupiter's certificate contemplated the use of its facilities for liquid condensate and liquefiable hydrocarbon transportation, as well as transportation of natural gas. (See Order of Commission herein, issued June 28, 1966). As long as liquid condensate and liquefiable hydrocarbons are carried in substantially the same quantities, there will be no diversion of facilities dedicated to the natural gas consumer.

their transportation* and if they are in intrastate commerce, the Louisiana Public Service Commission has jurisdiction over them.**

[3769]

Other guidelines of Commission jurisdiction were considered in the recent Supreme Court decisions of *California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) and *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965), where the Supreme Court discussed several policy factors behind the extent of jurisdiction of the Commission. Here again, a holding that the Commission does not have jurisdiction to regulate the charge for transportation, and/or the sale price, of liquid condensates will not violate these policy considerations.

For example, the Supreme Court stated that, except where Congress has called for a "legal" or "governmental" standard, which Congress did not do in the Natural Gas Act, the jurisdiction of the Commission follows the "engineering and scientific" facts of a transaction. The Court held further that private parties must not be permitted to raise "havoc . . . with the federal regulatory scheme" by changing the "jurisdictional result" called for by the "engineering and scientific" facts. (*Lo-Vaca*, supra, at 369) Jupiter's contracts with Union and PKM, and the interpretation of them and the application of Commission jurisdiction to

* See Subsection C, below.

** LSA-R.S. 45: 251-265. Section 252 provides that "All pipe lines through which petroleum is conveyed . . . are placed under the control of and subject to regulation by the Louisiana Public Service Commission." Section 251 defines petroleum as "crude petroleum, crude petroleum products, distillate, *condensate*, liquefied petroleum gas, any hydrocarbon in a liquid state, and any mixture or mixtures thereof." (emphasis added) The regulation of the intrastate transportation and sale of natural gas by pipe lines in the State of Louisiana is governed by another portion of the Louisiana statutes. LSA-R.S. 45: 301-303.

them, as contended for by Jupiter — herein and in the pending state and federal court actions — do not raise such "havoc"; in fact, the "engineering and scientific" facts of the differences between liquid condensates and natural gas are followed by Jupiter's position, [3770] as required by the Supreme Court in *Lo-Vaca*. A clarification by the Commission, indicating that it does not claim or intend to exercise rate jurisdiction, as described above, would mean that its claimed jurisdiction would follow these "engineering and scientific" facts, as required by the Supreme Court in *Lo-Vaca*.

Another policy factor noted by the Supreme Court in *Lo-Vaca* was the preclusion of discrimination "in favor of its 'nonjurisdictional' customers." (*Lo-Vaca, supra*, at 370). In the instant case, the Commission has power to preclude rate discrimination in favor of the nonjurisdictional services by allocating the cost of service between the jurisdictional and nonjurisdictional services. Actually, if the Commission were to regulate and reduce Jupiter's contractual "liquids hauling rate," the Commission would be simply benefitting the owners of those products, without any benefit to the consumers of natural gas.

Finally, the Supreme Court discussed the avoidance of a gap in the federal regulatory scheme. (*Lo-Vaca, supra*, at 370) As noted above, no gap can exist in the instant situation.*

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* It should also be noted that the "commingling" doctrine of *Lo-Vaca* and similar decisions has always been applied to commingling of gas with gas, and has never been applied to commingling of a liquid with gas.

[3771]

B. The Commission Cannot Regulate Liquid Hauling Rates

As noted earlier, the Commission's authority under the Natural Gas Act is limited to the sale and transportation of natural *gas*.

The issue of whether liquid condensate is "natural gas," as the latter term is used in the Natural Gas Act, has not been judicially determined. This results, in part, from the fact that the Commission has not previously claimed jurisdiction over liquid condensates. The existing judicial constructions of the term "natural gas," in decisions under the Natural Gas Act, are not helpful in determining the instant issue. In the most recent decision on the meaning of this term, *Deep South Oil Co. v. F.P.C.*, 247 F. 2d 882, (5th Cir. 1957), no issue of Commission jurisdiction over liquid condensates was involved in the litigation and the Court's decision, of course, did not go to this point. In *Mississippi River Fuel Corp. v. F.P.C.*, 121 F. 2d 159, 163-164 (8th Cir. 1941), the court was concerned only with the natural gas versus artificial gas aspects of the Act's definition of natural gas. Again, liquids were not discussed.

It is clear, however, that liquid condensate is not "natural gas," as the latter term is used in the Natural Gas Act. This is true for several reasons.

First, liquid condensate is not in a gaseous state when the relevant transportation occurs. A standard definition [3772] of "natural gas" refers specifically to its *gaseous* state, thereby excluding liquid condensates:

> Hydrocarbons which at atmospheric conditions of temperature and pressure are in a gaseous phase. (Williams and Meyers, Manual of Oil and Gas Terms, 240 (2nd ed. 1964.))

See Navajo Tribe of Indians v. U.S., 364 F. 2d 320 (Ct. Cl. 1966), where the court held that helium was included in a grant of "all the oil and gas deposits," its decision being primariy based on the gaseous state of helium. The court distinguished a case holding that a grant of "all minerals," listing only solid minerals as non-exclusive examples, did not include natural gas.

> Among the decisions cited by plaintiff is *McKinney's Heirs v. Central Kentucky Natural Gas Co.* 134 Ky. 239, 120 S.W. 314 (1909), in which the court construed a conveyance of "all minerals such as coal, iron, silver, * * * zinc or any other mineral of marketable value * * *." The court held that the conveyance did not include natural gas. 120 S.W. at 317.
>
> * * *
>
> In the recent case, however, the grant was not of "minerals," but of "all the oil and gas deposits." The term "gas deposits" is less broad than "minerals." Moreover, we are not dealing with the relationship between such minerals as coal and natural gas, substances which differ in form and which are produced by different means.
>
> * * *
>
> [3773]
>
> Although the parties to the lease may have been thinking mainly of fuel-type gases, it is still more realistic to presume that the grant included not only hydrocarbons but the other gaseous elements as well. It follows that, whether its percentage was high or low, the helium component was part of the "gas deposit" which passed to the lessee. (364 F.2d at 325-326)

Thus, both *Navajo Tribe* and *McKinney's Heirs* support the conclusion that natural gas does not include liquids.

Because of the physical fact that liquid condensates are not in a gaseous state at atmospheric temperatures and pressures, liquid condensates are easily separated from the well head natural gas stream by a simple mechanical separation device. In fact, they could not be maintained in a gaseous state during the normal gathering, transmission and distribution steps through which natural gas proceeds on its way to the consumer.

This leads to the second reason why liquids are not gas and are not jurisdictional: Liquid condensates cannot be transported through cross country transmission lines, or distribution systems used for the transportation of gas in any manner whereby they may be used by the consumer. In fact, such transportation and distribution of liquid condensates would normally be highly detrimental to the pipeline and distribution company's facilities, as well as to the fuel burning equipment of the consumer.

Third, although the division of the various substances in the oil-gas spectrum varies depending on the purpose
[3774] for which the division is made, liquid condensate is consistently recognized and treated as separate from gas. Regulations issued by The Geological Survey of the Department of Interior recognizes a clear distinction between liquid condensate and natural gas. Code of Federal Regulations, Title 30, Mineral Resources, Chap. II, Geological Survey (1968). In the definitions section of these regulations, liquid condensates removable from a natural gas stream mechanically without a manufacturing process are classified as oil, rather than gas.

> *(o) Gas.* Any fluid, either combustible or noncombustible, which is produced in a natural state from the earth and which maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.

> (p) *Oil, crude oil.* Any liquid hydrocarbon substance which occurs naturally in the earth, including drip gasoline or other natural condensates recovered from gas, without resort to manufacturing process. (30 C.F.R. § 221.2 (1968))

The Geological Survey's Regulations pertaining to the measurement of oil and gas production and computation of royalties contain differing provisions for (1) oil, (2) gas, (3) "casinghead or natural gasoline, butane, propane, or other liquid hydrocarbon substances extracted from gas" by means of a **[3775]** plant, and (4) "drip gasoline, or other natural condensate recovered from gas . . . without resort to manufacturing process." (30 C.F.R. § 221.43 - 221.52 (1968))

In determining the proper construction of the term "a well producing gas only," a recent series of decisions have recognized the important distinction between liquid condensate and natural gas. *Vernon* v. *Union Oil Co. of Calif.*, 270 F.2d 441 (1959), reh. denied 273 F.2d 178 (5th Cir. 1960); *Duke* v. *Sun Oil Co.*, 320 F.2d 853, reh. granted on another issue 323 F.2d 518 (5th Cir. 1963); and *Davis* v. *Laster*, 138 So. 2d 558 (La. 1962). These decision held that a "gas well" capable of producing liquid condensate in paying quantities is not "a well producing gas only" within the terms of a shut-in royalty clause in an oil and gas lease. In reaching its decision the court in the *Vernon* case, *supra*, emphasized the physical attributes of natural gas and of liquid condensates.

> The distinguishing attributes of gas . . . are the difficulties of storage and transportation. These attributes became important only because they were possessed by gas after it had been brought to the surface and prepared for market. Reservoir conditions were

> important only insofar as they affected the state of the final product. Liquid condensate, not being possessed of these attributes *at the critical point*, i.e., when prepared for market, is not therefore "gas" within the intendment of the constructive producion provision. (270 F.2d at 446)

The court in the *Duke* case, *supra*, referred to liquid condensate as a "liquid 'non-gas' product." (320 F.2d at 863)

[3776]

In *Mid-Continent Petroleum Corp.* v. *Blackwell Oil & Gas Co.*, 15 P2d 1028 (Okla. 1932), the court held that the defendant was not entitled to liquid condensate under a contract whereby the plaintiff-lessee sold to the defendant "all of its gas rights" under an oil and gas lease. The court wrote:

> It was readily condensable, for it condensed at the first opportunity in a simple appliance installed for the purpose of removing waste, without the use of machinery, appliances, and equipment commonly used for the manufacture of gasoline from casing-head gas or dry gas . . . There is a material difference between gasoline manufactured from gas by the use of machinery, appliances, and equipment constructed for that purpose and gasoline which comes from a well in a gaseous form in appreciable quantities, and which is readily condensable without the use of machinery, appliances, and equipment intended for the manufacture of gasoline from gas. (15 P. d at 1035)

Again, the distinction between gas and *liquids* is clearly drawn.

[3777]

C. Congress Has Vested Jurisdiction To Regulate Rates For The Transportation Of Liquid Condensates In The Interstate Commerce Commission, And The FPC Cannot Lawfully Invade That Province

Jupiter would further point out that any attempt by this Commission to assert jurisdiction over Jupiter's revenues from the transportation of liquid condensates would be in direct contravention of the regulatory scheme established by the Congress, under which jurisdiction over rates charged for

> . . . the transportation of oil or other commodity, except water and except natural or artificial gas, by pipeline*

* 49 U.S.C., Section 1. The regulations of the Interstate Commerce Commission implementing this grant of jurisdiction are found at 49 CFR, Parts 20, 110, 120, 141, 156 and 160.

is expressly vested in the Interstate Commerce Commission. This express grant of authority makes clear the intent of Congress to restrict the FPC's jurisdiction to natural gas and to invest jurisdiction over hydrocarbons in liquid form in the Interstate Commerce Commission, and in fact this division of regulatory authority and responsibility has been expressly recognized by the courts, and by this Commission. Thus, in *Mid-America Pipeline Company* v. *FPC*, 330 F. 2d 226 (D. C. Cir. 1964), the United States Court of Appeals for the District of Columbia Circuit, in referring to Mid-America, which operates an interstate pipeline **[3778]** system for the transportation of liquid hydrocarbons, referred to that company as being "subject to regulation only by the Interstate Commerce Commission." (330 F. 2d 226, at 227)

Similarly, in *City of Pittsburgh* v. *FPC*, 237 F. 2d 741 (1956), the D. C. Circuit again explicitly recognized that authority to regulate rates for transportation of liquid products lay in the Interstate Commerce Commission.

> Texas Eastern asserts that, since the Interstate Commerce Commission would have jurisdiction over Little Inch as a products carrier, the questions which have been raised as to the effects of conversion upon the barge operators should be left to be dealt with by that agency. *Although the I.C.C. has the power to regulate the rate schedules of products pipelines*, it does not have over them such certification jurisdiction as the Federal Power Commission has over natural gas pipelines. (237 F. 2d 755) (Emphasis added.)

And, with regard to the same facility, the FPC itself, at many points in Opinion 303, also recognized the exclusive authority in the Interstate Commerce Commission to regulate rates over transportation of liquid products:

> At the outset, it deserves mention that neither the conversion of the Little Inch to the transportation of petroleum products nor its operation as a products carrier is subject to the jurisdiction of the Commission. In the matter of rates and certain other aspects, it would be regulated by the Interstate Commerce Commission. (17 FPC at 851)

[3779]

> That part of the Little Inch converted for operation as a common carrier of petroleum products would be operated as a part of its petroleum products division, and would be subject to the jurisdiction of the Interstate Commerce Commission. (17 FPC at 848)

> This portion of the line would then be converted to transport clean petroleum products to Midwestern markets, in which capacity it would be under the jurisdiction of the Interstate Commerce Commission. (17 FPC at 845)

In view of the foregoing, it is clear that any attempt by this Commission to assert jurisdiction to regulate rates charged by Jupiter for transportation of liquid condensates would be outside the authority granted to the Commission by Congress, and would be in direct contravention of the expressly established Congressional scheme of regulation of pipeline transportation.

CONCLUSION

In view of the foregoing, and particularly the apparent inconsistency between the Commission's subject Order, and its proposed statement of General Policy and prior precedent, Jupiter respectfully requests that the Commission grant rehearing of the subject Order, insofar as it effects the Jupiter-Union and Jupiter-PKM relationships. Jupiter further requests that in its Order granting rehearing, the Commission clarify (or amend, if necessary) its Order, to make clear that the Commission does not [3780] propose to attempt to regulate the price at which natural gas companies sell liquid condensate, or the rate charged by such companies for transportation of such product. Such ruling would not, of course, interfere with the authority of the Commission, in proper proceedings, to allocate total costs between gas and liquid condensate operations, nor with the Commission's certification of facilities and operations involving transportation of gas and liquid condensates.

Natural further requests that the Commission make clear that its Order herein was not intended to suggest that

Jupiter cannot pay PKM less than 18.5¢ per Mcf, or cannot collect more than 1¢ per Mcf from Union, while it is attempting to, and or if it does, judicially establish its contractual right to do so.

Jupiter recognizes that the Commission may desire to issue such a clarifying Order at the time, or after, it issues its final Order in Docket No. R-338.

If, however, the Commission does not feel able to issue the above described Order, Jupiter respectfully requests that the Commission grant rehearing and in its Order so doing, order that hearings be held for the presentation of evidence by Jupiter on the matters involved herein, with full pre-hearing, hearing and post-hearing procedures, including briefs, exceptions, if [3781] necessary, and oral argument.*

The basis of Jupiter's request that hearings and briefs be had if the Commission proposes to adhere to the *possible* interpretation of the subject order set forth earlier, is that several of the issues discussed hereinabove have not been the subject of full briefing, and evidence has been introduced relative to none of such issues. Evidence, *inter alia*, regarding the nature and extent of Jupiter's complete services seems relevant to the inquiry, and full briefing of the complex issues involved, and particularly the jurisdictional questions, is required in the interest of sound and orderly adjudication, and justice to all parties, and the many other effected persons.

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* Jupiter believes, however, that since several, and possibly all, of the issues which would be faced in such proceeding might be made moot and academic by the results of the Court litigation between Jupiter, Union and PKM, further proceedings now would seem to be premature.

However, Jupiter reiterates that the Commission should order that it does not propose to attempt to control the price which Jupiter may receive for carrying liquids.

Jupiter respectfully reminds the Commission that this question is not unique to Jupiter. There are many producers and pipelines which carry liquids, often for a separate charge, and there are also sales thereof. This is an established part of the economics of the industry. [3782] The substantial change of Commission policy which *may* be involved in the subject Order would, Jupiter submits, be a matter of grave concern to a significant part of the natural gas industry.

Jupiter would conclude by noting that it would now be a complete about face if the Commission were to claim jurisdiction over liquids, when as recently as 1964, in *United Gas Pipe Line Company*, Opinion No. 428, 31 FPC 1180, 1191, the Commission stated:

> Union is engaged in the sale of natural gas, natural gas liquids and oil. Only the sale of gas is subject to regulation.

Consistent with that Commission view, Staff witness John M. Munn and Staff Counsel Joseph McShalley, at Tr. 394-398 in these proceedings, each gave their view that the transportation of condensate is not jurisdictional, that the Commission cannot and does not regulate the rate for such transportation, and that the Commission and its Staff is only "concerned with the charge for bringing the gas ashore."

In view of the foregoing, Jupiter can see no legal or practical basis for a direct reversal of Commission position

now, and can only conclude that the [3783] subject Order cannot be correctly so interpreted.

Respectfully submitted,

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May 1, 1968

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CAPTION

[3821]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, and John A. Carver, Jr.

The Jupiter Corporation Union Oil Company of California Phillips Petroleum Company and Kerr-McGee Corporation	Docket Nos. RI63-212 G-16790 RI68-111

ORDER GRANTING PETITION TO INTERVENE AND DENYING REHEARING

(Issued May 24, 1968)

On April 3, 1968, this Commission issued an order in which we hoped that we made clear our view that the Jupiter Corporation (Jupiter) and Union Oil Company of California (Union), had, through an extended period of time, evaded the terms of settlement orders into which they had entered in 1966 and 1962, respectively. Applications for rehearing[1] have been filed by Jupiter, Union and G. Burton Liese[2].

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[1] The Applications of Jupiter and Union were filed on May 2, 1968; that of G. Burton Liese on May 3, 1968.

[2] G. Burton Liese is a preferred stockholder of Jupiter who, on July 13, 1967, filed a petition for leave to intervene in this proceeding. As a result of an intervening Delaware Court of Chancery proceeding culminating in an order of April 5, 1968 which Mr. Liese has attached to his application for rehearing, it now appears that the interests of the preferred stockholders may be to some degree different than the interests of Jupiter's management. Consequently, in the interests of substantial justice and for the purpose of allowing representation of all proper interests herein, we now grant the petition of July 13, 1967 for leave to intervene.

The Commissions' order of April 3, 1968, held that Jupiter, as a result of the settlement into which it earlier entered, is bound to charge no more than 1c per Mcf for the transportation of gas from Union's offshore platforms to the Tennessee pipeline, and to restrict itself to a margin of 1c [3822] per Mcf on the gas which it purchases from Phillips-Kerr-McGee and sells to Tennessee. As there noted, Jupiter is a party to two basic contracts, with Phillips-Kerr McGee and with Union, which provide for the performance of several functions by Jupiter. Leaving aside the difference in form of the contracts, which is adequately explained by the April 3 order, these functions are both jurisdictional and nonjurisdictional. It is apparent, however, that the major function which Jupiter was to perform under the contracts was the transportation of gas from the offshore platforms at which it accepted the gas to the Tennessee pipeline, and that the vast bulk (if not all) of the rates which the Examiner found in Docket No. RI63-212 to be unjust and unreasonable was intended to serve as recompense for that service.[3] But Jupiter also transported condensate to its onshore separation plant and removed that condensate from the gas stream in which it had been mixed. In addition, the gas stream remaining after the removal of the condensates was delivered to a plant operated by Phillips in which certain of the heavy hydrocarbons were removed by liquifaction before final delivery to Tennessee.

The condensate is part of the raw natural gas emerging at the well head, and is part of the raw gas stream as trans-

[3] The cost of service data introduced in Docket No. RI63-212 indicated that the expense of providing this service ($258,431 in the test year) was far in excess of the expenses involved in all the other services combined ($15,828 in the test year). Exhibit 2, Schedule 4. The examiner's decision in that proceeding was superseded by a settlement agreement.

ported. Jupiter's attempt to distinguish the transportation of condensate from that of the remainder of the gas stream is, in reality, solely an exercise in semantics. There is, in [3823] Jupiter's lines, but one raw gas stream, and the condensate is a part of it. While this Commission does not assert jurisdiction to regulate the price at which liquids are sold after their removal from the gas stream, it does assert jurisdiction in this proceeding over any rates which Jupiter may charge for its transportation of the condensate and liquefiable hydrocarbons as a part of the gas stream.[4]

To the extent that Jupiter may be found in its present court proceedings to be due some amount for the nonjurisdictional services performed, these amounts may not be commingled or confused with the amounts due for jurisdictional services in Jupiter's accounts. Jupiter and its stockholder raise no other points not adequately disposed of in our original order.

The Commission's April 3 order held that Union was authorized to charge Tennessee no more than 1.0¢ per Mcf over and above its base rate under Union's Gas Rate Schedule No. 120 as filed with this Commission. Union's application for rehearing makes two points. First, it repeats its contention that it is entitled to receive from Tennessee, and ultimately the consuming public, the amounts which it may have to pay Jupiter for services which accrue only to the benefit of Union and not to the benefit of Tennessee, as well at the 1¢ per Mcf which it pays Jupiter for the transportation of the gas which Tennessee receives. As noted in

[4] Since the date of rendition of our original order, the Supreme Court, in Permian Basin Area Rate Cases, ... U.S. ...... (May 1, 1968), at p. 67, nn 111 (Slip Opinion), affirmed this Commission's assertion of jurisdiction over the total raw stream of casinghead gas, which includes entrained liquids. Area Rate Proceeding, Docket No. AR61-1, 34 F.P.C. 159, 209.

our previous order in this proceeding, this argument flies in the face of the Commission's [3824] settlement order in Docket No. G-16790. The Commission plainly understood that Pure, Union's predecessor in interest, proposed to charge Tennessee only the amount of the expenses which Pure incurred for the transport of the gas delivered to Tennessee. (See footnote 3 of the April 3 opinion herein.) If Pure truly intended, in its settlement agreement, that it would collect from Tennessee reimbursement for all expenses paid to Jupiter by Pure, then Pure and Union, its successor, have remained strangely silent about this intent since the order approving the settlement stated a contrary understanding.

Union's second point repeats the allegation that it was not bound by the Jupiter settlement because it was not a party thereto. This point was, in the main, adequately dealt with in our prior order. The suggestion by Union, however, that it repeatedly requested a hearing over a period in excess of a year, is without merit. It refers to no such requests, and we have found none in examination of Docket No. RI63-212. Its contention that it was denied due process because it could not seek review of that order is equally without merit, because it never sought to intervene in that proceeding or, like Phillips, to seek rehearing thereof. If, as it now appears to state (Application for Rehearing, p. 7) was not the case, it was aggrieved by our acceptance of the Jupiter settlement, it could have taken the necessary steps to establish its right to secure review.

No other points raised by the applicants have sufficient merit to warrant separate treatment.

The Commission orders:

(A) The petition of G. Burton Liese to intervene in these proceedings is granted.

(B) The Applications for rehearing filed herein by Union Oil Company of California, Jupiter Corporation and G. Burton Liese are denied.

By the Commission.

(SEAL)

Gordon M. Grant,
Secretary.

CAPTION

[3825]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY AND KERR-MCGEE CORPORATION	RI63-212 G-16790 RI68-111

MOTION OF PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR ENFORCEMENT OF COMMISSION ORDER

Come now PHILLIPS PETROLEUM COMPANY and KERR McGEE CORPORATION (referred to as "Phillips-Kerr-McGee") and move the Commission to make application to an appropriate United States District Court for issuance by such court of a writ of mandamus commanding The Jupiter Corporation to comply with the Commission's "Order on Petitions for Declaratory Relief" issued April 3, 1968. For cause movants would show:

I

On August 30, 1967, Phillips-Kerr-McGee filed their Petition for Order Directing The Jupiter Corporation to

Pay the Filed Rate for Purchased Gas. In response to this petition and a related petition filed by Tennessee Gas Pipeline Company, the Commission entered its order of April 3, 1968.

In that April 3, 1968, order the Commission Stated:

[3826]

> "We believe it beyond dispute that, pursuant to the final orders of this Commission in Opinion No. 470 and approving the Jupiter settlement, as fully described above, Jupiter must pay Phillips-Kerr-McGee 18.5 cents (at 15.025 pasia) for each Mcf of natural gas it purchases from those producers . . ."

This conclusion was reiterated in ordering paragraph (C) which provided:

> "Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latter's prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gate Rate Schedule No. 56, respectively."

By letter of April 11, 1968, Phillips made demand on Jupiter for payment of additional sums required to bring all payments up to date at the prescribed 18.5¢ per Mcf rate. Jupiter declined to make such payments, referring to its intent to file a Petition for Rehearing.

II

On May 24, 1968, the Commission entered its Order Granting Petition to Intervene and Denying Rehearing in which Jupiter's application for rehearing of the April 3, 1968, order was denied. In that order denying rehearing, the Commission reiterated that Jupiter was to ". . . re-

strict itself to a margin of 1¢ per Mcf on the gas which it purchases from Phillips-Kerr-McGee and sells to Tennessee." Accordingly, Phillips again demanded payment of all amounts due at 18.5¢ per Mcf, by its [3827] letter of May 27, 1968, a copy of which is attached hereto as Exhibit "A". Again, Jupiter has refused to make such payment according to its letter of May 29, 1968, a copy of which is attached hereto as Exhibit "B".

III

The Natural Gas Act, Section 20(b), provides:

> "Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder."

IV

As of deliveries of gas through the end of March 1968, Jupiter has failed to pay to Phillips-Kerr-McGee their lawful, in-line rate of 18.5¢, to the extent of $543,633.75. Such amount rests in Jupiter's hands wholly unsecured. Despite its representation to this Commission that the disputed amount would be placed in the custody of the Circuit Court of Cook County, Illinois (Answer and Motion to Dismiss or in the Alternative to Defer Action of The Jupiter Corporation, p. 7), Jupiter has failed to do so and has refused to escrow such amounts. The risk of the financial integrity of Jupiter should not be placed upon Phillips-Kerr-McGee as gas suppliers.

[3828]

Jupiter's unilateral refusal to pay to Phillips-Kerr-McGee their Commission-prescribed rate is unprecedented in the Commission's regulatory history to movants' knowledge. By virtue of its withholding of amounts due Phillips-Kerr-McGee, Jupiter has effectively avoided regulation and denied Phillips-Kerr-McGee their lawful in-line rates for nearly two years (since the June 28, 1966, order approving Jupiter's settlement). It is apparent from Jupiter's letter of May 29, 1968 (Exhibit "B") that Jupiter does not intend to comply with the Commission's repeated orders to pay Phillips-Kerr-McGee at the prescribed 18.5¢ per Mcf rate, but only to "make payment according to the order of that [Cook County, Illinois] Court."

V

Under all of the foregoing facts and circumstances it is appropriate and necessary, in the discharge of its statutory duties under the Natural Gas Act, that the Commission make application to an appropriate United States District Court under Section 20(b) of the Act and in such application seek the issuance of a writ of mandamus directed to Jupiter commanding compliance with the Commission's orders of April 3 and May 24, 1968. Movants respectfully request that such application be made forthwith and that movants receive notice of the filing of such application in [3829] order that movants may seek leave to intervene in the proceedings on such application.

Respectfully submitted,

PHILLIPS PETROLEUM COMPANY

Kenneth Heady
John R. Rebman

Its Attorneys

/s/ By John Rebman

and on behalf of

KERR-McGEE CORPORATION

Lynn Adams
General Counsel

CERTIFICATE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules of Practice and Procedure.

Dated at Bartlesville, Oklahoma, this 27 day of June, 1968.

/s/ John R. Rebman
John R. Bebman

Of Counsel for
Phillips Petroleum Company

[3830]

EXHIBIT "A"

May 27, 1968

Mr. Philip Rootberg
Financial Vice President
The Jupiter Corporation
10 South LaSalle Street
Chicago, Illinois 60603

Re: Rollover Field Gas Purchases —
Docket Nos. RI63-212, et al.

Dear Sir:

By Order of May 24, 1968, the Federal Power Commission denied Jupiter's application for rehearing and again

confirmed that, since August 11, 1965, Jupiter has been and is obligated to pay Phillips and Kerr-McGee for gas purchased from the Rollover Field at the rate of 18.5¢ per Mcf.

Our records show that, as of the end of March, 1968, Jupiter has failed to make payment at such rate by $543,-633.75. We accordingly request that, in compliance with such order:

(1) You remit payment to Phillips (for 100% of volumes purchased) of $543,633.75;

(2) You remit payments for gas deliveries subsequent to March, 1968, reflecting the 18.5¢ per Mcf rate; and

(3) As to all amounts paid or to be paid to Phillips for gas delivered in months for which payments are or may become past due under the contract billing and payments provision, you remit interest on such [3831] amounts at the legal rate of six percent per annum from the due date of such amounts.

Very truly yours,

Original signed by: John R. Rebman

John R. Rebman

JRR:djd

cc: Mr. Gordon M. Grant
Secretary
Federal Power Commission

Mr. Lynn Adams
Mr. Howard P. Robinson
Mr. Wm. W. Brackett
Mr. Howard R. Koven

EXHIBIT "B"

Law Offices

ROSS, HARDIES, O'KEEFE, BABCOCK,
McDUGALD & PARSONS
122 South Michigan Avenue
Chicago, Illinois 60603
Telephone 341-0515

Washington Office
1735 I Street, N. W.
Washington, D. C. 20006
Telephone 659-2277

May 29, 1968

Mr. John R. Rebman
Legal Department
Phillips Petroleum Company
Bartlesville, Oklahoma 74003

Dear Mr. Rebman:

I am replying, on behalf of The Jupiter Corporation, to your letter of May 27, 1968 to Mr. Philip Rootberg, Financial Vice President of that corporation.

Jupiter does not agree with your interpretation of the April 3, 1968 and May 24, 1968 orders of the Federal Power Commission.

The question of the appropriate level of payments by Jupiter to Phillips and Kerr-McGee is now in issue before the Circuit Court of Cook County, Illinois, and Jupiter will

continue to prosecute such action and make payment according to order of that Court.

Very truly yours,

s/ William W. Brackett
William W. Brackett
an Attorney for
The Jupiter Corporation

WWB:ddr

• • • •

CAPTION
[3838]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

The Jupiter Corporation Union Oil Company of California Phillips Petroleum Company and Kerr-McGee Corporation	RI63-212 G-16790 RI68-111

RESPONSE OF THE JUPITER CORPORATION TO MOTION OF PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR ENFORCEMENT OF COMMISSION ORDER

The Jupiter Corporation (Jupiter) hereby files its Response in opposition to the Motion filed by Phillips Petroleum Company and Kerr-McGee Corporation (Phillips-Kerr) on July 1, 1968 herein.

1. The subject Motion asks that the Commission "make application to an appropriate United States District Court for issuance by such court of a writ of mandamus commanding The Jupiter Corporation to comply with the Commission's 'Order on Petitions for Declaratory Relief' issued April 3, 1968."

2. Under Section 20 of the Natural Gas Act, such authority appears to be granted to the Commission, relative to a "violation" of a Commission Order.

3. As stated in the May 29, 1968 letter of Jupiter's counsel to Phillips-Kerr, Jupiter does not interpret the subject Commission Orders in the same way as does Phillips-Kerr. Thus, whereas Phillips-Kerr *assumes* that Jupiter is in violation of such

* * * *

CAPTION

[3841]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL POWER COMMISSION

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA PHILLIPS PETROLEUM COMPANY AND KERR-MCGEE CORPORATION	RI63-212 G-16790 RI68-111

RENEWAL OF MOTION OF PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION FOR ENFORCEMENT OF COMMISSION ORDER

On June 27, 1968, Phillips Petroleum Company and Kerr-McGee Corporation submitted a motion in this proceeding requesting the Commission to apply to an appropriate United States District Court, under Section 20(b) of the Natural Gas Act, for a writ of mandamus commanding The Jupiter Corporation to comply with the Commission's Order of April 3, 1968, as affirmed by the Commission's Order of May 24, 1968. These Orders declare that Jupiter has been since August 11, 1965, and is now obligated to pay movants the Commission-approved filed rate of 18.5c

per Mcf for the gas it purchases from movants and resells to Tennessee Gas Pipeline Company. The motion recited that Jupiter has refused to make such payments. Jupiter still refuses to do so.

In response to the motion, Jupiter stated that it would be filing a petition to review the Orders of the Commission which were the subject of the motion. Jupiter has in fact filed such a petition. Jupiter has not, however, [3842] sought either from the Commission or from the reviewing court any stay of the Commission Orders, and none has of course been granted.

The Commission has not yet acted upon the motion, possibly on the mistaken assumption that the Orders violated by Jupiter have been stayed. This pleading is now being submitted and prompt action on it is being requested, because the underlying Orders continue to be in full force and effect and continue to be violated by Jupiter. The pendency of judicial review proceedings has not altered the situation as it existed when the motion was filed; indeed, with the passage of time the situation has worsened. It is essential that the Commission act now to see to it that its Orders are complied with.

Section 19(c) of the Natural Gas Act declares in unmistakable and unambiguous terms that the commencement of judicial review proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order" under review. Where, as here, the reviewing court has issued no stay, the Orders under review remain in full force and effect, and the Commission is obligated to enforce them.

Were the Commission not to take appropriate enforcement action, it would be seriously undermining Congress' clear [3843] intent to prevent parties from being able to

avoid the effect of a Commission order by the simple expedient of seeking judicial review of the order. Congress was obviously concerned that the right for court review not provide parties with unlimited opportunities for delay and otherwise frustrate duly adopted decisions of the Commission.

The danger of just this happening is illustrated by the procedural history of Jupiter's efforts in this case to avoid effective Commission regulation.

Jupiter has been under an obligation since August 11, 1965, to pay movants at the rate of 18.5c per Mcf under gas rate schedules filed pursuant to the Commission's Orders in Opinion No. 470, 34 F.P.C. 486, orders as to which Jupiter exercised to the full its rights to apply for rehearing and to petition for judicial review. On June 28, 1966, as the culmination of a 3½ year administrative proceeding, the Commission accepted a Jupiter offer of settlement by an Order under which it is authorized to charge Tennessee no more than 19.5c per Mcf and is limited to a margin of 1c per Mcf between its purchase and sale prices. Jupiter has however refused to pay movants at the 18.5c rate; it has taken the position, contrary to these Orders and the 1968 Orders of the Commission, that it is entitled to a 2.4c per Mcf margin.

[3844]

Jupiter's refusal to pay the Commission-ordered filed rate was drawn to the Commission's attention in a petition filed by movants on August 30, 1967. The Commission did not act on this petition until April 3, 1968; Jupiter's application for rehearing was denied on May 24, 1968; on July 23, 1968, Jupiter filed with the United States Court of Appeals for the District of Columbia Circuit its petition to review the Commission's Orders of April 3 and May 24, 1968.

Neither this Court nor the Commission has entered any stay of these Orders.

In short, Jupiter has violated and continues to violate with impunity final and effective Commission Orders and has succeeded in resisting all efforts of the Commission to regulate it, efforts which began in December 1962, almost six years ago, when the Commission instituted its Section 5 investigation of Jupiter's rates.

Under these circumstances and after such protracted delay a court would undoubtedly deny any stay of the Commission Orders that Jupiter might request. At any rate this is clearly the kind of situation in which Congress intended that the reviewing court carefully consider the advisability of granting such a stay. If the courts' discretionary power, granted by Congress, to determine whether a stay should or should not be granted is to be at all meaningful, the Commission must see [3845] to it that orders are observed when no stay has been granted. This is the case here.

The urgency of the present situation is underscored by the fact that Jupiter's refusal to comply with the Commission's Orders is a clear failure to honor a fundamental obligation of all those subject to the Commission's jurisdiction, payment of the applicable approved rate.

Nothing is clearer in the entire administrative law area than the principle that the tariff or rate duly approved by the public regulatory commission must be paid. Strict observance of the filed rate is the cornerstone on which effective administration of a program designed to protect the public interest is built. Typical of the degree of court concern with the inviolability of the appropriate tariff is the statement in *Bernstein Bros. Pipe & Machine Co. v. Denver & R.G.W.R. Co.*, 193 F. 2d 441, 444 (10th Cir. 1951), that

"a tariff, so long as it is enforced, is in respect to the rates named, to be treated as though it were a statute binding upon the carrier and shipper alike." *See also Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516 (1939); *Compania Anonima Venezolana De Nav. v. A. J. Perez Exp. Co.*, 303 F. 2d 692 (5th Cir. 1962); *American R.R. Express Co. v. American Trust Co.*, 47 F. 2d 16 (7th Cir. 1931); *Louisville & N. R.R. v. Dickerson*, 191 F. 705 (6th Cir. 1911). To permit a filed **[3846]** rate to be violated, even if unintentionally, "defeats the very purpose of the law":

> "Congress, in order to eliminate every form of discrimination, has provided that there shall be permitted neither an intentional nor an unintentional deviation from the predetermined schedule of rate. An intentional act in granting a shipper a preferential rate was made a crime. To permit a departure from the regular rate provided only that it is the result of a misunderstanding or a mistake defeats the very purpose of the law." *Central Warehouse Co. v. Chicago R.I. & P. Ry.*, 20 F. 2d 828, 829 (8th Cir. 1927).

The importance of acheving observance of the proper rate has been stressed repeatedly by the courts. Partial payment has never been excused. *Atchison, T. & S.F. Ry. v. Bouziden*, 307 F. 2d 230 (10th Cir. 1962). For example, private carriers cannot be estopped by their initial failure to state the correct rate. *Pitts C., C. & St.L. R.R. v. Fink*, 250 U.S. 577 (1919). Nor will equitable considerations of any kind suffice as a defense. *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939).

The Court's observation in *Louisville & N. R.R. v. Central Iron Co.*, 265 U.S. 59, 65 (1923), reflects the unyielding emphasis that has been placed on insuring collection of the proper duty:

"No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who [3847] had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

This principle that rates filed with the appropriate regulatory body must be fully and literally complied with, regardless of the circumstances, is of course applicable in the natural-gas area.

For example, in *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951), the plaintiffs sued under the Natural Gas Act seeking partial recovery of payments previously made to defendant at a rate duly approved by the Federal Power Commission. They alleged, and the District Court held, that defendant had charged plaintiffs rates which were fraudulent, even though approved by the Commission, and that the proper rate was less than the filed rate. The Supreme Court held that even if the defendant had acted fraudulently the Court could not grant the relief requested by plaintiffs. The Court warned:

"[Petitioner] can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." 341 U.S. at 251.

[3848]

The reasons for the courts' insistence that tariffs be literally and fully complied with are obvious. Beyond the simple and self-evident proposition that all laws of the United States should be enforced and evasions of any kind

prevented is the fact that Congress has here determined that the price at which natural gas is sold must be regulated. But effective regulation necessarily requires effective enforcement. Payment of the Commission-approved price is essential to the regulatory structure and is necessary if long-range planning is to be possible, and if orderly, adequate, and efficient growth of the industry is to be insured.

Failure to pay the proper rate, consequently, goes beyond the interests of the immediate parties involved and impinges upon those general interests that the Commission has the obligation to protect.

Jupiter's actions have frustrated these principles and will continue to do so. In the face of a clear duty to pay one rate, it is paying another. If no action is taken by the Commission, there is the danger that Jupiter's refusal to comply with its duty to pay the proper rate may continue for years until protracted litigation has been completed.

Just as a matter of efficiency, action by the Commission is to be preferred over litigation between private parties because such action affords far quicker and more **[3849]** certain payment of the appropriate rate. Of greater importance, however, the integrity of the filed rate system is at stake in this case, because Jupiter here apparently claims the right to set off from the filed rates amounts which it claims are owed to it by movants. But the mere assertion of a claim should not be permitted to excuse noncompliance with filed rates. Otherwise, the filed rate could be ignored at will because its collection could be delayed interminably.

Refusal for an indefinite period to pay a supplier at the proper rate unnecessarily threatens the integrity of the filed rate by conditioning it on the vicissitudes of future

and probably protracted litigation. The obligation to pay the filed tariff is too important and too clear to be made contingent upon the validity of a claim asserted by a shipper or purchaser as a set-off from the filed rate, where it may take years for the validity of that claim to be determined but where there is no dispute as to the appropriate filed rate. Any such postponement of payments of tariffs places upon the seller the risk of the buyer's insolvency and unfairly imposes on the supplier the cost of litigation to procure what the Act guarantees him. Moreover, it complicates any effort by the Commission to monitor both the industry and the parties directly involved for purposes of any future determinations it may have to make to fulfill its manifold responsibilities under the Natural Gas Act.

[3850]

In addition, if the assertion of a claim is sufficient to excuse noncompliance with the filed rate, opportunities would be created for preferential or discriminatory arrangements for the sale of natural gas, contrary to the mandate of Section 4(b) of the Natural Gas Act. The filed rate doctrine was developed in order to eliminate all types of discriminatory arrangements. *Louisville & N. R.R.* v. *Mottley*, 219 U.S. 467 (1911); *Warehouse Co.* v. *United States*, 283 U.S. 501 (1931); *United States* v. *Associated Air Transport*, 275 F.2d 827 (5th Cir. 1960).

This point has particular pertinence here, for the rate which Jupiter refuses to honor is the "in-line" rate adopted by the Commission for sales from Southern Louisiana. Other producers in that area, selling to companies that respect their obligations, have been collecting the same 18.5¢ "in-line" rate. Movants, however, because of Jupiter's refusal to honor this rate and the Commissions' failure to enforce it, have been receiving an amount less than that paid to these other producers, although the Commission

has determined that the same "in-line" rate should be certified for all Southern Louisiana sales.

Consequently, movants again urge upon the Commission the necessity of its prompt action to assure compliance with movants' Commission-approved filed rate. As movants have pointed out, the Commission should exercise its power, under **[3851]** Section 20(b) of the Act, to apply to an appropriate United States District Court for a writ of mandamus compelling Jupiters' compliance with the Commission's Orders. Jupiter's dilatory tactics and the importance of the Orders which have been and continue to be violated by Jupiter call now for the exercise of this enforcement power by the Commission.

In addition, the Commission should now make use of its administrative powers under Section 16 of the Act, which authorizes the Commission "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter." In light of what has already been said, it is necessary and appropriate for the Commission to issue, and the Commission is requested to issue, an order (1) directing Tennessee to pay directly to movants their filed rate and to Jupiter only the difference between this rate and Tennessee's purchase price,* and (2) directing Jupiter to pay to movants the sum of $646,115.61, the amount owed movants by Jupiter as of July 31, 1968, as a result of Jupiter's refusal to pay movants' filed rate, and such additional amount as may become due prior to the issuance **[3852]** of the Order requested herein. Under this Order the price to Tennessee

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* The precise amount per Mcf to be paid movants will depend upon whether any stay is obtained of the effectiveness of the Commission's September 25, 1968, Opinion and Order in the *Southern Louisiana Area Rate Proceeding.*

will remain the same, movants will obtain the rate to which they are entitled under the Commission's Orders, and Jupiter will be limited to the margin approved by the Commission when it accepted Jupiter's offer of settlement.

Respectfully submitted,

PHILLIPS PETROLEUM COMPANY
KERR-McGEE CORPORATION

By /s/ Herbert Dym
Howard C. Westwood
Herbert Dym
Covington & Burling
701 Union Trust Building
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Bartlesville, Oklahoma 74003

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Kerr-McGee Building
Oklahoma City, Oklahoma 73102

Attorney for Kerr-McGee Corporation

[3853]

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of § 1.17 of the Rules and Practice and Procedure.

Dated at Washington, D.C., this 16th day of October, 1968.

/s/ Herbert Dym
Herbert Dym

Of counsel for
Phillips Petroleum Company
and Kerr-McGee Corporation

* * * *

CAPTION

[3868]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Enforcement Order—Rates (Transportation Service)

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, and John A. Carver, Jr.

The Jupiter Corporation	Docket Nos.
Union Oil Company of California	RI63-212
Phillips Petroleum Company and	G-16790
Kerr-McGee Corporation	RI68-111

ORDER ON MOTION TO ENFORCE AND REDUCING RATES IN ACCORDANCE WITH PREVIOUS SETTLEMENT AND OPINION NO. 546

(Issued December 13, 1968)

On December 5, 1962, this Commission issued an order instituting an investigation of the rates of the Jupiter Cor-

poration (Jupiter). 28 FPC 942. Jupiter transports natural gas from the Rollover Field, offshore South Louisiana to an onshore delivery point to Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee). It transports gas for Union Oil Company of California (Union), and is paid for the carriage thereof. It provides a similar service for Phillips-Kerr-McGee, but the transaction is cast in the form of a sale to Jupiter by Phillips-Kerr-McGee and a resale to Tennessee by Jupiter. The contract under which Phillips-Kerr-McGee had been selling gas to Jupiter had provided for a rate based upon the rate received by Jupiter for its sales to Tennessee.

In our order of December 5, 1962, we noted that Jupiter received an average of 3.4¢ per Mcf from Union (then Union's predecessor, the Pure Oil Co.) and an average of 2.3¢ per Mcf spread between the price it paid Phillips-Kerr-McGee[1] and the price it received from Tennessee, and that these rates might be unjust, unreasonable, unduly discriminatory or preferential.

On January 5, 1966, the examiner issued his recommended decision in the case, 35 FPC 1095. He noted, *id.* at 1114, that Jupiter had caused much delay in the proceeding, and the procedural history of the case (set out at 35 FPC 1096-1098) fully supports that observation. He also found that the rates Jupiter had charged were unjust and unreasonable, and that Jupiter was entitled to a reimbursement for its services in transporting natural gas, both as to the Union transportation and the Phillips-Kerr-McGee purchase and Tennessee sale, of an amount which worked out to .632¢ per

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[1] In Opinion No. 470, *Phillips Petroleum Co. et al.*, 34 FPC 486 we held that the proper in-line rate for the Phillips-Kerr-McGee sale to Jupiter was 18.5¢ per Mcf, and ordered the sale price reduced to that figure.

Mcf. While the proceeding was pending on exceptions. Jupiter filed a settlement proposal based on a 1.0¢ per Mcf settlement rate for both transactions. On June 28, 1966, we accepted that settlement offer, 35 FPC 1091, holding, as to the Phillips-Kerr-McGee portion of Jupiter's services, the spread which Jupiter was to receive would be based on the 1.0¢ per Mcf rate.

In 1967 Phillips-Kerr-McGee[2] filed a petition with the Commission seeking an order directing Jupiter to pay the 18.5¢ per Mcf filed rate for the gas it purchased for resale to Tennessee. In opposing that petition, Jupiter took the position that because it performed certain services for Phillips-Kerr-McGee which were assertedly non-jurisdictional, in addition to the jurisdictional transport of gas for resale to Tennessee, it was contractually entitled to reduce its payment to Phillips-Kerr-McGee by the same amount per Mcf that it had been required, by the terms of the settlement, to reduce its rates to Tennessee. Because all these services were covered in one contract, Jupiter contended, it could simply offset the reduction which the Commission had ordered in its jurisdictional rates by an automatic increase in its receipts for the allegedly compensable non-jurisdictional services. This assertedly automatic increase was of the same amount per Mcf as it had been required to reduce its rates to Tennessee. The effect of this action would be to retain the full "spread" which the examiner had earlier found [3870] to be far in excess of any justifiable rate, and which had supposedly been reduced by the Commission's order approving the settlement agreement.

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[2] Tennessee Gas Pipeline Company also filed a petition with the Commission seeking similar relief, but with respect to gas transported by Jupiter for Union Oil Company of California. That petition is not here in issue, however.

(3870)

On April 3, 1968, the Commission issued an order, ... FPC ......, which rejected these arguments of Jupiter. We held that some of the functions which Jupiter asserted to be non-jurisdictional were in fact within the jurisdiction of this Commission, and that the remaining services appeared to be quite minor. We noted that Jupiter could not, under the Natural Gas Act, collect any fees from Phillips-Kerr-McGee for the jurisdictional transportation services until it secured a certificate for those services at an appropriate rate. And we noted that if Jupiter were entitled to reformation of its contract with Phillips-Kerr-McGee in order to establish some payment for the remaining minor non-jurisdictional services it performed for Phillips-Kerr-McGee, that reformation would have to be done in a court of equity, outside the scope of the contract on file with us as a rate schedule. Thus, our order of April 3, 1968, expressly rejecting Jupiter's offset argument, provided, *inter alia*, that (Ordering paragraph (C)):

> Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latters' prescribed certificate rate of 18.5c per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's Gas Rate Schedule No. 56, respectively.

On May 24, 1968, the Commission clarified its April 3 order, and denied Jupiter's application for rehearing, expressly holding that to the extent that Jupiter might be found in court proceedings to be due some amount for the non-jurisdictional services performed, those amounts might not be commingled or confused in Jupiter's accounts with the amounts due for jurisdictional services.

[3871]

Phillips-Kerr-McGee have now renewed a motion for enforcement of the Commission's order, initially made before

Jupiter had filed its petition for review of our order of April 3, 1968, in the United States Court of Appeals for the District of Columbia Circuit. It now appears that, although Jupiter has not sought a stay of our order of April 3, 1968, it has continued to act in violation of that order by tendering only 17.1¢ per Mcf to Phillips-Kerr-McGee. By their renewal of motion for enforcement, Phillips-Kerr-McGee assert that Jupiter, as of July 31, 1968, had unlawfully withheld $646,115.61 since the 1966 settlement, and continues to collect the "spread" found unjust and unreasonable in 1966.

Jupiter does not deny that it has continued to collect the spread found to be improper, but continues to assert that it does so without violation of this Commission's orders. Jupiter carefully refrains from discussing in its pleadings in response to the renewed motion for enforcement the language and obvious purport of the Commission's orders of April 3, 1968, and May 24, 1968. While Jupiter may disagree with these orders and has, in fact, filed a petition for review thereof, it may not, in the absence of a stay (which it has not even sought from this Commission or the Court of Appeals) ignore them. A more open course of conduct in violation of our orders than that which is presently being followed can hardly be imagined.

In the light of the history of this proceeding it seems plain that no more explicit order could be directed to Jupiter than those previously addressed to it. We have therefore concluded that the only satisfactory method by which the integrity of our order can be maintained, pending the resolution of the proceeding to review our order of April 3, 1968, is an order directed to Tennessee as well as Jupiter.

The alternative motion of Phillips-Kerr-McGee, however, is far more likely to be effective, if adopted. For, because Tennessee pays Jupiter, which pays Phillips-Kerr-McGee for the gas in question, it is a relatively simple matter to temporarily adjust these relationships to ensure that Jupiter does not profit by delay and possibly jeopardize the final recovery of the monies involved by the financial difficulties it has often asserted. Thus we shall order Tennessee to pay directly to Phillips-Kerr-McGee the amount which Jupiter would otherwise owe them for all deliveries of gas after the date of this order.

The amount which Phillips-Kerr-McGee is entitled to receive, however, has been altered by the proceedings in Docket Nos. AR61-2 and the issuance of Opinion No. 546, issued September 25, 1968, which determined the just and reasonable rates for natural gas produced in the South Louisiana area. Since Phillips-Kerr-McGee contracted to sell this Rollover Field gas to Marine Gathering Company, Jupiter's predecessor, well before 1961, the base price for the gas in question, sold for delivery to Tennessee, is,

While we could, in theory, seek enforcement by mandamus in an appropriate United States District Court, such a procedure would not be likely to protect the integrity of our order or materially assist Phillips-Kerr-McGee. For the same issues which Jupiter raises in the present review proceedings would be raised in the enforcement proceeding. And since the venue [3872] provision of the Act could bar the bringing of such a suit in the District Court for the District of Columbia, an unseemly conflict of jurisdiction among courts might well result. We conclude that no desirable purpose would be likely to be served by accepting the suggestion of Phillips-Kerr-McGee that we seek a writ of mandamus in the district court.

under Opinion No. 546, 17.0¢ per Mcf,[3] the price applicable to gas sold under contracts dated before January 1, 1961. Assuming that Opinion 546 is affirmed on rehearing and in any judicial review, it would be this 17.0¢ price which would be applicable subsequent to September 25, 1968.

[3873]

Tennessee's obligation to Jupiter is likewise dependent upon the effect of Opinion No. 546 on the Phillips-Kerr-McGee rates. For our original approval of a 19.5¢ per Mcf price for Jupiter's sale to Tennessee[4] was predicated upon the 18.5¢ price which had been set for Phillips-Kerr-McGee's sale to Jupiter and the consequent 1¢ per Mcf price spread for Jupiter. The Jupiter settlement, 35 FPC 1091, rehearing denied, 36 FPC 495, provided for a "reduced transportation rate of 1¢ per Mcf * * *." 35 FPC 1091, 1094, Ordering Clause A. And Jupiter's previous agreement to flow through or refund to Tennessee any rate reductions or refunds it received from Phillips-Kerr-McGee resulting from a reduction in price of those sales was expressly noted by the Commission in approving the settlement. See 35 FPC 1091, 1094, footnote 8.[5] Thus, to the

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[3] It is not clear whether the BTU adjustment prescribed in Opinion 546 is applicable here. The gas which Jupiter buys from Phillips-Kerr-McGee for redelivery to Tennessee is that gas which Tennessee receives, which has been treated to remove condensates and liquefiable hydrocarbons.

[4] The change in price was filed by Jupiter on July 13, 1966, as Supplement No. 6 to its FPC Gas Rate Schedule No. 8, and was accepted for filing by the Commission on August 16, 1966.

[5] In its offer of settlement, Jupiter had undertaken to reduce its rate to Tennessee only in the event and to the extent that the Commission validly authorized a price for gas sold by Phillips-Kerr-McGee to Jupiter at a level different from 18.5 cents per Mcf. To the extent that this condition might have precluded the Commission from future investigation of Jupiter's rates, it was considered undesirable, and was disapproved. This left Jupiter's agreement to flow through to Tennessee refunds or rate reductions it received from Phillips-Kerr-McGee, *supra*, and the approval of its settlement transportation rate of 1¢ per Mcf.

extent that Jupiter's price to Phillips-Kerr-McGee for the gas to be sold to Tennessee is reduced from 18.5¢ per Mcf to 17.0¢, together with adjustments possible under Opinion 546. Tennessee's obligation to Jupiter is commensurately reduced.

Because the proceedings in Docket Nos. AR61-2 *et al.* are presently before us on petitions for rehearing, and because the filing of new rate schedules has been postponed pending rehearing, it is not now clear just what the new proper rate for Phillips-Kerr-McGee will be or when Phillips-Kerr-McGee will be required to collect any lower just and reasonable rate. We shall accordingly, provide that Tennessee will pay 18.5¢ per Mcf to Phillips-Kerr-McGee for gas delivered after the date of this order, such payments to be reduced, by the appropriate amount, as of the date Phillips-Kerr-McGee would otherwise be required to collect a lesser sum per Mcf as a result of further proceedings in AR61-2. We shall also provide that, so long as Tennessee makes this payment, Jupiter shall be relieved thereof. Thus Jupiter will suffer no financial detriment.

[3874]

Phillips-Kerr-McGee has also moved for an order requiring Jupiter presently to pay the $646,115.61 which Jupiter appears to owe through July 31, 1968, as a result of failing to comply with the settlement order of June 28, 1966, together with accretions to that sum since July 31, 1968.[6] There is no doubt that Jupiter does owe a substantial additional amount to Phillips-Kerr-McGee[7] under the out-

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[6] It would appear, from a comparison of the motion and renewal of motion of Phillips-Kerr-McGee, that the amounts which Jupiter has unlawfully withheld have approximated $25,000.00 per month.

[7] Any refunds which might otherwise be due Jupiter from Phillips-Kerr-McGee as a result of Docket Nos. AR61-2 *et al.* will be directed to be reported to this Commission and held by Phillips-Kerr-McGee pending further order.

standing Commission orders and to the extent a further order by us is sought directing that Jupiter make the payments to Phillips-Kerr-McGee we have previously held they are obligated to make, we shall so order. While Jupiter has at various times throughout the course of this proceeding asserted its financial difficulties, we are not in a position to determine either Jupiter's ability to make these payments now or the need of Phillips-Kerr-McGee for protection against possible insolvency on the part of Jupiter.[8] Since, however, Jupiter's appeal from our earlier orders to the same effect is pending in the Court of Appeals we see no need to take administrative action here to protect either Jupiter or Phillips-Kerr-McGee. If Jupiter believes this further order impairs its financial status or that continued failure to comply with it and the order of April 3, 1968, in any other sense puts it in jeopardy, it is free to seek the stay in the Court of Appeals it has so long avoided. [3875] If Phillips-Kerr-McGee believes that the possibility of the eventual recovery of what Jupiter has been held to owe them is in jeopardy, they can seek bond from Jupiter in the Court of Appeals.[9]

Because the earlier order of this Commission is presently before the United States Court of Appeals for the District of Columbia Circuit, we are directing our Solicitor to advise that Court at once of the issuance of this order. If Jupiter were to obtain from that court a stay of our April 3, 1968, order, we would, of course, be prepared to stay this order as well upon notification that the stay had been entered. But unless that original order is stayed, we believe the violation here to be so flagrant as to make this some-

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[8] See, however, the information cited in Moody's Industrials.

[9] To the extent that the issue between Jupiter and Phillips-Kerr-McGee may resolve itself into who has or is entitled to the present use of the money involved we see no need for our intervention into the controversy.

extent that Jupiter's price to Phillips-Kerr-McGee for the gas to be sold to Tennessee is reduced from 18.5¢ per Mcf to 17.0¢, together with adjustments possible under Opinion 546, Tennessee's obligation to Jupiter is commensurately reduced.

Because the proceedings in Docket Nos. AR61-2 *et al.* are presently before us on petitions for rehearing, and because the filing of new rate schedules has been postponed pending rehearing, it is not now clear just what the new proper rate for Phillips-Kerr-McGee will be or when Phillips-Kerr-McGee will be required to collect any lower just and reasonable rate. We shall accordingly, provide that Tennessee will pay 18.5¢ per Mcf to Phillips-Kerr-McGee for gas delivered after the date of this order, such payments to be reduced, by the appropriate amount, as of the date Phillips-Kerr-McGee would otherwise be required to collect a lesser sum per Mcf as a result of further proceedings in AR61-2. We shall also provide that, so long as Tennessee makes this payment, Jupiter shall be relieved thereof. Thus Jupiter will suffer no financial detriment.

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standing Commission orders and to the extent a further order by us is sought directing that Jupiter make the payments to Phillips-Kerr-McGee we have previously held they are obligated to make, we shall so order. While Jupiter has at various times throughout the course of this proceeding asserted its financial difficulties, we are not in a position to determine either Jupiter's ability to make these payments now or the need of Phillips-Kerr-McGee for protection against possible insolvency on the part of Jupiter.[8] Since, however, Jupiter's appeal from our earlier orders to the same effect is pending in the Court of Appeals we see no need to take administrative action here to protect either Jupiter or Phillips-Kerr-McGee. If Jupiter believes this further order impairs its financial status or that continued failure to comply with it and the order of April 3, 1968, in any other sense puts it in jeopardy, it is free to seek the stay in the Court of Appeals it has so long avoided. **[3875]** If Phillips-Kerr-McGee believes that the possibility of the eventual recovery of what Jupiter has been held to owe them is in jeopardy, they can seek bond from Jupiter in the Court of Appeals.[9]

Because the earlier order of this Commission is presently before the United States Court of Appeals for the District of Columbia Circuit, we are directing our Solicitor to advise that Court at once of the issuance of this order. If Jupiter were to obtain from that court a stay of our April 3, 1968, order, we would, of course, be prepared to stay this order as well upon notification that the stay had been entered. But unless that original order is stayed, we believe the violation here to be so flagrant as to make this some-

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[8] See, however, the information cited in Moody's Industrials.

[9] To the extent that the issue between Jupiter and Phillips-Kerr-McGee may resolve itself into who has or is entitled to the present use of the money involved we see no need for our intervention into the controversy.

what unusual action necessary and appropriate to carry out the provisions of the Act. We shall make this order effective 15 days after issuance, except that, if within that time Jupiter applies to the Court of Appeals for a stay of the order of April 3, 1968, we shall direct Tennessee to retain all payments otherwise due to Jupiter pending the result of the stay application.

Accordingly, the Commission finds:

(1) The Jupiter Corporation has flouted the terms of the Commission's order of April 3, 1968.

(2) As a result of that violation, Phillips-Kerr-McGee is deprived of the payment of the rate which is on file and which Jupiter is required to pay.

[3876]

(3) It is necessary and appropriate to carry out the provisions of the Natural Gas Act to enter the following orders.

The Commission orders:

(A) Tennessee Gas Pipeline Company, a Division of Tenneco Inc., is hereby ordered to pay directly to Phillips-Kerr-McGee, on the account of the Jupiter Corporation, for gas received after the date of this order, 18.5¢ per Mcf for the gas delivered to Tennessee Gas Pipeline Company, such payments to be reduced by the appropriate amount as of the date Phillips-Kerr-McGee is required to collect a lesser sum per Mcf as a result of the proceedings in Docket No. AR61-2.

(B) Tennessee Gas Pipeline Company is relieved of payment to Jupiter for gas for which payment is made in accordance with paragraph (A) on Jupiter's account.

(C) The Jupiter Corporation is relieved of payment to Phillips-Kerr-McGee for gas for which payment in accordance with paragraph (A) is made by Tennessee Gas Pipeline Company.

(D) To the extent that Jupiter's payments, since June 28, 1966, to Phillips-Kerr-McGee have been on some other basis than the 18.5¢ per Mcf ordered by this Commission, Jupiter shall pay to Phillips-Kerr-McGee the amount of the shortage.

(E) If refunds are found to be due the Jupiter Corporation by Phillips-Kerr-McGee, then they shall be held pending order of the Commission by Phillips-Kerr-McGee and a prompt report of the amounts due and circumstances of their collection shall be furnished the Commission.

(F) This order shall become effective fifteen days after the date of issuance, except that, if the Jupiter Corporation, before that effective date, files an application for a stay **[3877]** of the order of April 3, 1968, in the United States Court of Appeals for the District of Columbia Circuit, the Tennessee Gas Company is directed to hold all payments presently due or to be due the Jupiter Corporation pending the result of that application.

By the Commission. Commissioner Carver dissenting filed a separate statement appended hereto.

(SEAL)

Gordon M. Grant,
Secretary.

[3878]

THE JUPITER CORPORATION UNION OIL COMPANY OF CALIFORNIA	Docket No. RI63-212 Docket No. G-16790
PHILLIPS PETROLEUM COMPANY AND KERR-McGEE CORPORATION	Docket No. RI68-111

(Issued December 13, 1968)

CARVER, Commissioner, *dissenting:*

In their pleading filed with the Federal Power Commission on October 16, 1968, denominated "Renewal of Motion," Phillips Petroleum Company and Kerr-McGee Corporation, Movants, ask for a new and different form of relief, stating that:

> it is necessary and appropriate for the Commission to issue, and the Commission is requested to issue, an order (1) directing Tennessee to pay directly to movants their filed rate and to Jupiter only the difference between this rate and Tennessee's purchase price, . . . (p. 11)

Tennessee[1] is not a captioned party in this proceeding. While generally supporting Phillips and Kerr-McGee in their controversy with Jupiter, Tennessee opposes the above-quoted new request in a response filed on October 25, 1968, arguing that it "goes beyond the bounds of procedural relief" and that it "would create new contractual relationships between Tennessee and movants" beyond the Commission's authority under the Natural Gas Act. (pp. 1-2)

Tennessee makes several supporting arguments, two of which I consider to be central and controlling. Since the

[1] Tennessee Gas Pipeline Company, a Division of Tenneco Inc.

Commission has adopted the theory of relief asserted in the supplemental pleading of October 16, 1968, my agreement with the soundness of Tennessee's position requires me to dissent.

The first argument is that an order upon Tennessee to pay funds due under Jupiter's tariff directly to Phillips and Kerr-McGee, is tantamount to an order to deviate from a filed rate. Phillips and Kerr-McGee, in their brief supporting their request for the Commission to institute enforcement proceedings under Section 20 of the Natural **[3879]** Gas Act, cite many of the cases which supoprt the integrity of the filed rate, particularly *Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246(1951)

> [Petitioner] can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, *and not even a court can authorize commerce in the commodity on other terms.* (at p. 251; emphasis added.)

The other ground is that the order requested involves an exercise of judicial power not granted to the Commission, in effect constituting "attachment or garnishment of Jupiters' potential assets in the hands of Tennessee."

I do not believe that the characterization of the relief as "judicial" is determinative. However, the equivalence of the issued order to an order of attachment or garnishment focuses attention on the fundamental concept underlying Tennessee's objection, and my ground for dissent, which is that the Natural Gas Act, the sole source of the Commission's authority, does not encompass this kind of relief.

"Garnishment is generally considered to be a purely statutory proceeding, unknown to the common law." 38 C.J.S. *Garnishment* §1b. If even a court must seek authority in

affirmative legislation to subject property in the hands of third persons owed to a defendant to the satisfaction of a plaintiff's claim, it would seem that an administrative agency would be doubly constrained, and inhibited from reading such relief into the generality of Section 16 or its equivalent.

This is particularly true where, as with the Natural Gas Act, other provisions of the statute specify with particularity the method of enforcement of the Commission's orders, as against recalcitrant certificate holders. Section 20(b) is the basis of the relief Phillips and Kerr-McGee have sought, and it certainly seems on its face to be appropriate:

> Upon application of the Commission the district courts of the United States and the United States [3880] courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder. Section 20(b), Natural Gas Act; 15 U.S.C. §717s.

The argument in the Commissions' opinion that the statutory procedure "would not be likely to protect the integrity of our order or materially assist Phillips-Kerr-McGee" because the same issues are before the United States Court of Appeals under Section 19(c), and because there would result "an unseemly conflict of jurisdiction among courts" seems to me to be officious. Certainly it cannot be an argument to abandon the specific provisions of a statute in favor of contrived relief inferred from Section 16.

/s/ JOHN A. CARVER, JR.
John A. Carver, Jr., Commissioner

* * * *

CAPTION

[3903]

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, and John A. Carver, Jr.

	Docket Nos.
The Jupiter Corporation	RI63-212
Union Oil Company of California	G-16790
Phillips Petroleum Company and Kerr-McGee Corporation	RI68-111

ORDER DENYING REQUEST FOR STAY AND PETITION FOR REHEARING AND CLARIFYING PREVIOUS ORDER

(Issued January 22, 1969)

On December 13, 1968, the Commission issued an order on a motion by Phillips-Kerr-McGee to enforce the several earlier orders by the Commission in this proceeding. That order directed the Tennessee Gas Pipeline Company, while continuing to pay the Jupiter Corporation the 1c per Mcf to which it is entitled under the Commission's order of June 28, 1966, as clarified by the orders of April 3, 1968 and May 24, 1968, to pay directly to Phillips-Kerr-McGee the 18.5¢ per Mcf to which it was entitled as a result of those orders and of Opinion No. 470, 34 FPC 486. When the price to which Phillips-Kerr-McGee is entitled is reduced as a result of the proceedings in Docket No. AR61-2, Tennessee was directed to reduce the amount it paid directly to Phillips-Kerr-McGee appropriately, while continuing to pay 1¢ per Mcf directly to Jupiter. Jupiter was also directed to pay to Phillips-Kerr-McGee the amounts which

it owed under the above orders.[1] The order of December 13 [3904] specifically stated that it would be stayed if the order of April 3, 1968, which is under review in the United States Court of Appeals of the District of Columbia Circuit were stayed. We also made provision for Tennessee to hold all moneys otherwise to be paid with respect to these transactions pending resolution of any such stay proceeding, if such a proceeding were filed within fifteen days.

On December 23, 1968, Jupiter filed a petition for rehearing and request for stay of portions of the December 13, 1968, order. Jupiter asserts that:

(1) the motions of Phillips-Kerr-McGee to enforce were automatically denied by operation of Section 1.12(e) of the Commission's Rules of Practice and Procedure and could not, therefor, be granted;

(2) because a portion of the services which it performs for Phillips-Kerr-McGee are non-jurisdictional, the Commission may not or should not control the "spread" on the contracts which cover both services;

(3) the "tone" of that order was unnecessarily severe;

(4) the order exceeds the Commission's legal authority; and

(5) the Commission had no power to issue the order since it "modified" the order of April 3, 1968, as to which a review proceeding was pending.

Jupiter requests the grant of rehearing of the December 13, 1968, order and that it be set aside or amended to change the statement and implication that Jupiter has willfully violated the Commission's orders. Alternatively, Jupiter requests that [3905] the Commission stay the subject

[1] An amount in excess of $646,115.61.

order pending review of the principles involved in the review proceeding before the United States Court of Appeals for the District of Columbia Circuit. If the above requests are not granted, Jupiter requests a temporary stay pending action by the Court of Appeals on a motion by Jupiter for a stay, and that ordering paragraph (F) of the December 13, 1968, order, which directs Tennessee to hold all payments with respect to the gas here involved pending resolution of a stay motion timely presented in the Court of Appeals, be set aside.

We are not persuaded that our order should be altered. Plainly, Rule 1.12(e) does not automatically deny motions of the type here made by Phillips-Kerr-McGee simply by the passage of 30 days. That section, by its terms, refers only to motions made during hearings, not after the entire matter has been submitted to the Commission.

Jupiter's argument as to the Commission's power to control the "spread" charged under its contract is the same argument which Jupiter has made, unsuccessfully, several times before. We need go no further than to point out, again, that the contract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the sale of natural gas to Jupiter and is subject to our jurisdiction as such. Jupiter may not evade its obligation to pay the filed rate by offsetting other contract claims against such jurisdictional rates.

Nor do we believe that the tone of our December 13, 1968, order was excessively harsh. Even if Jupiter could claim that earlier orders were ambiguous, there could be no doubt about its obligations after our declaratory order of April 3, 1968.[2] No amendment to the "tone" of our order is appropriate.

[2] And the order on rehearing of May 24, 1968.

We do not agree that this Commission is limited to seeking mandatory injunctions in court to enforce its orders. We believe that Section 16 of the Natural Gas Act gives us authority to fashion a remedy consistent with the spirit of the Act when, as here, the necessary parties are all natural-gas companies within our jurisdiction and parties to the proceeding, and the remedy is necessary or appropriate to carry out the provisions of the Act. To the extent Jupiter may disagree review remains available in the courts from our order.

The allegation that we have modified an order under review in the courts is equally baseless. The order of April 3, 1968, is in no way modified. The order of December 13, 1968, merely enforced the certificate order of August 11, 1965 and the settlement order of June 28, 1966, as clarified by the order of April 3, 1968. No conclusions reached by the April 3 order were modified, nor were any responsibilities imposed thereby varied. To the extent that the order of December 13, 1968, specifies a different method of enforcing these obligations than contemplated in the June 28, 1966 settlement order or the order of August 11, 1965 (which are not subject to review) in the face of the continued unwillingness of Jupiter to comply therewith, such procedures were expressly made subject to suspension should Jupiter, as it has in fact done, seek a stay of our earlier action in the Court of Appeals for the District of Columbia. Certainly we have not compromised the jurisdiction of the court by providing that, pending its resolution of the stay request, Tennessee hold further payments of money due under the transactions in issue.

We do not believe that any basis exists for us to grant a stay of our order of December 13, 1968. Jupiter may proceed with the stay motion it has now filed in the Court of

Appeals, as the order of December 13, 1968, envisioned, and is free in addition to seek a stay of that order.

[3907]

Nothing before us indicates that the effectuation of the December 13, 1968, order during the period necessary for the court to consider such stay motion or motions will irreparably injure Jupiter or any other party to this proceeding.

We are advised by our Solicitor that the motion to stay filed by Jupiter in the United States Court of Appeals for the District of Columbia Circuit was not actually filed within fifteen days of our December 13 order although a copy thereof was timely received by us. In the circumstances, since Jupiter would appear to have made a good faith attempt to file timely, we elect to treat the motion as timely filed for that purpose, and direct Tennessee to hold all payments presently due or to be due the Jupiter Corporation pending the result of the application for a stay, in accordance with ordering paragraph (F) of our December 31, 1968, order.

On January 10, 1969, Tennessee Gas Pipeline Company filed an application for clarification of our order of December 13, 1968. Tennessee asserts a need for clarification with respect to:

(a) the amounts due Jupiter,

(b) the procedure for the reduction in rates as a result of the proceedings in AR61-2,

(c) the date upon which the procedure specified in the order of December 13, 1968 becomes applicable, and

(d) the arrangements to be operative between Phillips-Kerr-McGee, Tennessee and Jupiter.

Inasuch as we have elected to treat Jupiter's filing of a stay motion in the Court of Appeals as made within the time specified by our order, only question (c) above presently is at issue. This result follows because our order provided that, if Jupiter timely filed a motion for a stay of the orders of April 3, 1968, and May 24, 1968, Tennessee would be required to hold all moneys due for the gas here involved pending the [3908] resolution of the stay proceeding. Nonetheless, since the stay proceeding should be resolved in the near future, Tennessee is entitled to a clarification of its doubts on all issues.

The December 13, 1968, order directed Tennessee to divert 18.5 cents per Mcf of the 19.5 cents per Mcf[3] which would otherwise be paid Jupiter to Phillips-Kerr-McGee, on Jupiter's account. That left 1 cent per Mcf to be paid directly to Jupiter, if and when the Court of Appeals denies Jupiter's stay petition, the amount to which Jupiter is entitled under its settlement and the intervening orders. We shall make this clear by order.

Tennessee expresses doubt as to the proper procedure to be followed in passing on the rate reduction to be made as a result of the proceedings in Docket No. AR61-2, noting that there is no separate ordering clause directing Jupiter to file revised rates to pass on the reduction. As we have noted in our December 13 order (Mimeo p. 6), however, Jupiter is under order to flow through to Tennessee any rate reductions or refunds it receives from Phillips-Kerr-McGee resulting from a reduction in price of the gas here at issue. Ordering paragraph A of the December 13, 1968, order provides that Tennessee shall reduce its payments on the date Phillips-Kerr-McGee's price is reduced. Jupiter has not contested this portion of our

[3] Both figures subject to change as a result of the proceedings in Docket No. AR61-2.

order. Nonetheless, although no further express order requiring Jupiter to make the filing it is obligated to make should be necessary, we shall order the filing in question.

Tennessee has questioned the procedure for establishing the BTU adjustment under Opinion 54. Ordinarily, the quality statement required by that order would be executed by Phillips-Kerr-McGee and Jupiter. Because of the special circumstances of this case, however, we shall provide in Docket No. AR61-2 that the quality statement applicable to the gas resold to Tennessee be executed by Phillips-Kerr-McGee, Jupiter and Tennessee.

The procedures established by our order of December 13, 1968, are applicable to all gas received after the date of the order. Jupiter was granted a fifteen day period within which to apply to the court of appeals for a stay, however, [3909] and, since alternative procedures were to be applied dependent upon Jupiter's decision whether to seek a stay, neither procedure was actually to be applied until that date had passed. The order, however, remains applicable to all gas delivered after December 13, 1968.

The Commission, of course, has not directed Tennessee to buy gas directly from Phillips-Kerr-McGee. Rather, we have temporarily adopted the procedures set out in our December 13, 1968, order to assure that Jupiter complies with its obligations to the producers. The existing contract regulations, insofar as not inconsistent with our orders,[4] remain controlling. As to possible overcharges

[4] Tennessee also raises a question as to the applicability of the term of its contract with Jupiter which provides that Jupiter may cease deliveries of gas if not paid. Since the money paid by Tennessee to Phillips-Kerr-McGee is paid on Jupiter's account Jupiter is being paid the contract amount. But even were this not so, the contract provision cited is necessarily subordinate to the provisions of Section 7(b) of the Natural Gas Act, which prohibits abandonment of service without the approval of this Commission.

which may result from misbillings, these may be recovered by Tennessee from Jupiter or Phillips-Kerr-McGee dependent on which received the overcharge. And, of course, Jupiter, or Phillips-Kerr-McGee may similarly recover undercharges from Tennessee. So that there may be no doubt about this matter, we shall clarify it by order.

The Commission finds:

The assignments of error and grounds for rehearing and stay as set forth in the petition for rehearing and motion for stay filed by Jupiter present no facts or legal principles which would warrant any change, modification or stay of our order of December 13, 1968.

[3910]

The Commission orders:

(A) The petition for rehearing and motion for stay filed on December 23, 1968, by the Jupiter Corporation are denied.

(B) The Tennessee Gas Pipeline Company, a Division of Tenneco, Inc., is directed to hold all payments presently due or to be due the Jupiter Corporation pending the result of the stay application filed by the Jupiter Corporation in the United States Court of Appeals for the District of Columbia Circuit.

(C) The Tennessee Gas Pipeline Company, a Division of Tenneco Inc., is directed, if the stay application filed by the Jupiter Corporation in the United States Court of Appeals for the District of Columbia Circuit is denied, to pay 1.0¢ per Mcf for gas received after December 13, 1968, to the Jupiter Corporation.

(D) The Jupiter Corporation is directed to file a reduction of its rates to the Tennessee Gas Pipeline Company

within ten days following the filing by Phillips-Kerr-McGee of a reduction of rates to Jupiter as a result of the proceedings in Docket No. AR61-2, the filed reduction to be in the same amount and for the same period as that which Phillips-Kerr-McGee files.

(E) Any inadvertent overcharges or undercharges which may result in noncompliance with the terms of ordering paragraph A of the Commission's December 13, 1968, order and ordering paragraph C of this order shall be paid by the Jupiter Corporation, Phillips-Kerr-McGee or the Tennessee Gas Company, a Division of Tenneco Inc., as their interests may appear, to the party entitled to the additional money under those orders, within 30 days after final determination thereof.

By the Commission. Commissioner Carver adheres to the views set forth in his statement accompanying the order issued December 13, 1968, in Dockets Nos. RI63-212, *et al.*

Gordon M. Grant,
Secretary.

[SEAL]

BRIEF FOR RESPONDENT
FEDERAL POWER COMMISSION 575

IN THE

United States Court of Appeals
For the District of Columbia Circuit

Nos. 22154, 22693

THE JUPITER CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

TENNESSEE GAS PIPELINE COMPANY, a Division of Tenneco Inc., PHILLIPS PETROLEUM COMPANY AND KERR-MCGEE CORPORATION, LONG ISLAND LIGHTING COMPANY, *Intervenors*

No. 22442

UNION OIL COMPANY OF CALIFORNIA, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

TENNESSEE GAS PIPELINE COMPANY, a Division of Tenneco Inc., PHILLIPS PETROLEUM COMPANY AND KERR-MCGEE CORPORATION, LONG ISLAND LIGHTING COMPANY, THE JUPITER CORPORATION, *Intervenors*

On Petitions to Review Orders of the Federal Power Commission

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February 10, 1969

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TABLE OF CITATIONS

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On Petitions to Review Orders of the Federal Power Commission

BRIEF FOR THE FEDERAL POWER COMMISSION

STATEMENT OF ISSUES PRESENTED

I. A. Whether the Commission properly refused to permit Jupiter to set off against the filed rate for gas it purchases from producers unliquidated sums it claims as compensation for services it renders for these producers.

B. Whether the Commission's remedial measure—an order directing Tennessee temporarily to pay that filed rate directly to the producers on Jupiter's account, rather than channeling it through Jupiter—was appropriate to enforce Jupiter's previously determined obligations.

II. A. Whether the Commission acted in accordance with a 1962 settlement and compliance rate filing in permitting Union to charge its pipeline customer, Tennessee, reimbursement only for such of Jupiter's services to Union as related to gas transported and sold to Tennessee.

B. Whether, absent any factual disputes, the Commission properly issued its declaratory order relating to Union without holding an evidentiary hearing.

III. Whether the Commission was correct in holding that it has jurisdiction over the transportation of the full gas stream even though some components thereof may ultimately be sold in liquid form.

Case No. 22154 has previously been before this Court on Jupiter's motion for stay, argued January 23, 1969, and denied.

COUNTERSTATEMENT OF THE FACTS

Introduction.—This case involves one of the many chapters in the long history of the Commission's attempt to regulate just and reasonable rates to be charged by The Jupiter Corporation for certain operations it renders in connection with a natural gas pipeline it owns and operates between the Rollover Field, offshore Southern Louisiana, and the facilities of Tennessee Gas Pipeline Company. While the jurisdictional rates were thought to be fixed by a 1966 settlement of Jupiter's rates, controversy over the effect of that settlement resulted in the present proceeding as well as litigation in federal and state courts in Illinois.

Jupiter, through its pipeline, performs a number of separate functions coming within the Commission's jurisdic-

tion. It purchases gas from Phillips Petroleum Company and Kerr-McGee Corporation (Phillips-Kerr-McGee), which it transports onshore and resells to Tennessee. It also for a fee transports to the Tennessee pipeline gas which Union Oil Company of California (Union), as successor to the Pure Oil Company (Pure),[1] sells to Tennessee. Finally, and this is the root of the post-settlement controversy, it transports, through these same facilities, a limited amount of condensate and liquefiable hydrocarbons, which though part of the gas stream as delivered to Jupiter by Phillips-Kerr-McGee and Union, are not part of the gas sales to Tennessee but are separated out and returned to the producers. In addition it does some of the separation for the producers.

The investigation of Jupiter's rates under Section 5(a) of the Natural Gas Act was initiated on December 5, 1962, about a week after the Commission had approved a settlement of Pure's rates, including the latter's sale of gas from the Rollover Field to Tennessee. The settlement rate was pegged on Jupiter's charge for transporting this gas to Tennessee. In instituting the investigation into Jupiter's rates, the Commission noted (R. 2626, 28 FPC 942) that Jupiter was receiving about 2.3 cents per Mcf on its Phillips-Kerr-McGee service while collecting about 3.4 cents per Mcf from Pure.

After long delays in the hearing procedures, which the examiner attributed to Jupiter (R. 3157, 35 FPC 1091, 1114), an initial decision was issued in 1966 in which the examiner recommended that the proper charge for Jupiter's transportation relating to both services would be .632 cent per Mcf; the staff of the Commission had recommended a charge of .518 cent per Mcf. Thereafter, Jupiter made two offers of settlement (R. 3336, 3370). The second, amended offer, based on a 1-cent per Mcf settlement transportation rate, was accepted by the Commission on June

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1 These companies will be referred to interchangeably as Pure and Union. Jupiter's facilities have also been operated under successive managements; initially the Marine Gathering Company (Marine), and later Commonwealth Oil Corporation (Commonwealth), preceded Jupiter.

28, 1966. (R. 3405, 35 FPC 1091.)[2] In accepting the offer the Commission noted (R. 3407, 35 FPC 1091, 1093) that acceptance would immediately cut over $1,000,000 annually from the purchased gas costs of Tennessee Gas Pipeline Company, purchaser of the Rollover Field gas, without further litigation; establish a firm 1-cent transportation rate; immediately settle several actions and court proceedings initiated by Jupiter, together with several issues not here relevant; and protect Jupiter and its stockholders. The Commission also noted (R. 3408, 35 FPC 1091, 1094, fn. 8) that Jupiter had, in a brief earlier filed in another F.P.C. proceeding, agreed to flow through or refund to Tennessee any rate reductions or refunds it received from Phillips-Kerr-McGee resulting from Jupiter's Rollover Field operations.

The instant proceeding results from Jupiter's continuing effort to collect 3.4 cents per Mcf from Union and a 2.4 cent margin on its transactions with Phillips-Kerr-McGee. The complex background necessary to an understanding of Jupiter's contentions is set forth below in sections corresponding to the two sets of transactions involved.

The Union-Jupiter operation. Union's gas production in the Rollover Field is transported to shore by Jupiter. Union retains the ownership of the gas. After removal of condensate from the stream at an onshore Jupiter plant and delivery thereof to Union, Jupiter delivers the remaining gas stream to Tennessee's lines which carry it about 8½ miles to a processing plant owned by Phillips where liquefiable hydrocarbons (lighter than the condensate) are removed.[3] The remainder of the stream is then re-delivered to Tennessee and sold to it.

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[2] In its settlement offer, Jupiter reserved the right to seek reformation of its contracts with Phillips-Kerr-McGee and Union to seek additional compensation for services other than transportation of gas. See *infra*, p. 8. Much of Jupiter's case is based on that reservation.

[3] The natural gas stream is a mixture of hydrocarbons, all of which can be liquified at differing temperatures and pressures. Some condense more easily (in part through the reduction in temperature as the gas is brought up from the reservoir) and are removed from the stream by simple mechanical separation. This separation occurs where it facilitates transmission of the

Two different rates relate to this transaction. Prior to Jupiter's 1966 settlement Union was to pay Jupiter 4 cents per Mcf for the first 62,500 Mcf handled daily and 3 cents per Mcf for additional volumes. This averaged out to about 3.4 cents per Mcf. Under the Jupiter settlement, Jupiter's charge for transporting the gas sold by Union to Tennessee was reduced to one cent. ??

The second rate is that for Union's sale to Tennessee. Prior to Pure's settlement in 1962, it charged Tennessee at a flat price of 21.333 cents per Mcf. This rate had been suspended in 1958, and was being collected subject to refund. Tennessee received none of the condensate or liquefiable hydrocarbons removed from the stream and stored for Pure's benefit.

As part of its settlement offer, Pure proposed a two-part rate to Tennessee on the Rollover Field sale to consist of a flat charge (initially 16.75 cents per Mcf) plus reimbursement for the actual payments by Pure to Jupiter for transportation (R. 2541). It also agreed to reflect any change in the applicable Jupiter transportation charge in its rate to Tennessee (R. 2555). The Commission approved the proffered settlement (*Pure Oil Company, et al.*, 28 FPC 889 (1962)). In doing so it stated (*Id.* at 891) its understanding that Pure proposed to be reimbursed for the gas transportation cost:

> * * * It proposes a settlement rate of 16.75¢ per Mcf, plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of

gas stream or where the heavier hydrocarbons can be sold more profitably as liquids than as part of the gas stream. This class of substances is known as "condensate". Other lighter hydrocarbons must be removed by more sophisticated processing operations such as that carried on in Phillips' Lake Arthur plant. Depending on costs, prices, and the hydrocarbon mix within the stream it may happen that "condensates" are left in the stream for separation at a nearby extraction plant along with lighter hydrocarbons. Or, a stream may be so dry that extraction is profitable only after the cumulation of a huge stream in plants far away from the producing field. Whether and when the constituents of a natural gas stream are turned into liquids depends on temperature and pressure, the mix of constituents, and economic considerations. Furthermore, these factors are variable over time and at times some factors are unknown.

the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein. * * *

Soon thereafter Union filed an amendment to its rate schedule, in compliance with the settlement (R. 1980-1984). See, *infra,* p. 25.

The Phillips-Kerr-McGee operation. The gas produced by Phillips-Kerr-McGee has, since 1953, been sold to Jupiter at the lease and resold to Tennessee on shore. Jupiter receives a "spread" representing the difference between what it pays the producers and what it collects from Tennessee.

As in the case of Union, condensate is removed at the lease by the producers' own equipment, measured, and restored to the gas stream. Jupiter transports the entire stream to shore, removes the condensate again and redelivers it to Phillips-Kerr-McGee. The rest of the stream travels to Phillips' processing plant for removal of lighter liquefiable hydrocarbons, and the residue is turned over to Tennessee. Under a separate contract Jupiter receives 30 percent of the proceeds from the hydrocarbons extracted at the Phillips plant.

The Jupiter-Phillips-Kerr-McGee contract provided that Jupiter would retain a somewhat variable proportion of the price collected from Tennessee under its contract with Jupiter (averaging 2.4 cents) and transmit the rest to the producers as payment for the gas. (R. 1441-1444). In Opinion No. 470 (*Phillips Petroleum Co., et al.,* 34 FPC 486 (1965)) the Commission reduced Phillips-Kerr-McGee's rate to 18.5 cents from the then average price of 18.933 cents tax plus reimbursement it was receiving. It correspondingly amended Jupiter's temporary certificate in Opinion 470 to prescribe a total rate of 20.9 cents (in lieu of the contract rate of 21.333 cents plus tax reimbursement), on the grounds that (1) if, as Jupiter then contended, its entire transportation operations were nonjurisdictional, it was entitled by contract to no more than 2.4 cents per Mcf spread, and (2) if its operations were jurisdictional, the record justified no more than 2.4 cents. (At

this point Jupiter's rate case, from which the present case arises, was already pending, and the Commission expected therein to set a just and reasonable rate for Jupiter's services.) Jupiter initiated, and later abandoned, an appeal from Opinion No. 470.

The Jupiter rate investigation and settlement.—In December, 1962, the Commission began a Section 5(a) rate proceeding against Jupiter. R. 2625-2628, 28 FPC 942 (1962). After various delays, including efforts by Jupiter to obtain injunctions in the courts against the proceeding and to persuade the Commission to terminate the case, the examiner issued his initial decision (R. 3126-3188, 35 FPC 1095) finding .632 cent per Mcf to be a just and reasonable rate for all of Jupiter's services, including those it now claims are nonjurisdictional.

Before the Commission could act on exceptions to this decision, Jupiter proposed a settlement under which it would have received 1.25 cents per Mcf for the transportation of the gas sold to Tennessee. Noting that its contracts with the producers did not provide separate charges for the several services rendered by it, Jupiter stated "that an equitable resolution of this case requires either a reformation of its various contract[s] with the Rollover Field producers (Pure, Phillips and Kerr McGee) to require those producers to pay Jupiter, or Commission permission for Jupiter to retain, charges for the gathering of natural gas, and for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids" (R. 3336, 3338). It also said that "with appropriate revisions of its contracts, or with Commission consent, the charge for the jurisdictional deliveries of gas made by Jupiter can be reduced to a level of 1.25 cents per Mcf, with Pure, Phillips and Kerr McGee paying reasonable charges for Jupiter's services related to their liquids" (R. 3338).

Specifically, it offered, with respect to the service to Pure (Union), to agree to a total contract price of 1.75 cents per Mcf (in lieu of the then contract price of 3.4 cents), with a provision that 1.25 cents of this "be an im-

puted charge'' for gathering natural gas delivered to Tennessee (R. 3345-3346). With respect to the Phillips-Kerr-McGee gas, it proposed to reduce the existing contract price of 22.8333 cents to 19.75 cents ''with the provision that Jupiter will make upward or downward revisions in that price whenever, and in the amount that, the Phillips-Kerr-McGee price is permitted or required by the Commission to be increased or decreased above or below the 18.5 cents per Mcf price established in Opinion No. 470'' (R. 3346). It proposed that Phillips and Kerr-McGee should agree to revise their contracts to permit Jupiter to credit against the 18.5 cents gas sale price an amount of 0.25 cents per Mcf for the ''service of gathering and separating Phillips-Kerr-McGee's condensate'' (R. 3346-3347). In the event the producers were not willing to agree to any revisions in their contracts, Jupiter offered to make its filings so long as they were accepted with the understanding they were not ''intended to affect or invalidate Jupiter's contractual rights to payment for services to those producers which are not subject to Commission jurisdiction'' (R. 3347).

After various objections from each of the producers and the distributor interveners, Jupiter amended its offer of settlement (R. 3370-3386). It now proposed: (1) a 1.0 cent charge ''for transporting natural gas'' for Union and (2) a ''contractual sale price'' to Tennessee of 19.5 cents, variable only if and ''to the extent that a valid action by the Federal Power Commission authorizes a price for gas sold by Phillips-Kerr-McGee to Jupiter at a level different from 18.5 cents per Mcf'' (R. 3371-3372). This offer was again with the understanding that Jupiter was not waiving its rights to the collection of compensation for other services from all the producers concerned. (R. 3371-3373). Union and Phillips-Kerr-McGee both raised objections to the settlement (R. 3352-3356, 3357-3358, 3397-3398, 3400-3402) but the Commission approved it (R. 3405, 35 FPC 1091). Phillips-Kerr-McGee's objection had been that their firm 18.5 cent rate should not be reduced, and that they had contracted for the additional services to be performed free of charge. The Commission

said of the contract reformation issue (R. 3409, 35 FPC 1091, 1094):

> Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips-Kerr-McGee of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons and the producers answers on that point does not present any issue to be determined at this time. Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission.

Phillips-Kerr-McGee requested rehearing, complaining that this statement implied the existence of arrangements still open for negotiation. In denying rehearing, the Commission made it clear that it had not meant to indicate either that further negotiations were necessarily possible or that they were required; and that it had simply said that it was "not now determining the claimed rights of any party on this matter." (R. 3430, 36 FPC at 495-496). Neither Jupiter nor any of the producers petitioned for review of the order approving the settlement. On July 13, 1966, Jupiter forwarded new rate schedules in compliance with the order. (R. 3410.1, 3410.2).

Transactions since the Jupiter settlement.—Following the settlement, Jupiter did not immediately seek to reform its contract with Union in accordance with its settlement reservation; rather it simply began billing Union separately 1 cent for transporting the gas sold to Tennessee and 2.4 cents for other services. Union refused to pay the two rates and, after its offer to amend the contract to specify a single rate of 1 cent had been rejected, it was billed for, and paid, a single rate of 3.4 cents. This it sought to pass on *in toto* to Tennessee, taking the position that its own 1962 settlement had required Tennessee to reimburse it for all of the charges it paid Jupiter. After a short time Tennessee declined to pay more than the base price for the gas, on the ground that it was required to repay only a 1-cent transportation charge. In view of Tennessee's ac-

tion, Union stopped all payments to Jupiter. And starting in July 1967 ~~it~~ Jupiter ceased paying Phillips-Kerr-McGee 18.5 cents (as it had done before the settlement) and tendered 17.1 cents instead, claiming that the 1.4 cent difference resulted from the reduction in Jupiter's rate to Tennessee as agreed to in the settlement.

Jupiter took both of these disputes to court. It sued Phillips and Kerr-McGee in an Illinois state court (R. 3553-3559) to recover amounts paid in excess of 17.1 cents between the date of its settlement and July 1967 and also seeking a declaration as to its contract rights. Jupiter sued Union in the United States District Court for the Northern District of Illinois (R. 3613-3618). In its action against Phillips-Kerr-McGee it contended that it owed these producers only 17.1 cents, rather than the certificated price of 18.5 cents. It asserted that its contract rights against the producers were unimpaired by the settlement, since all sums due it under the contracts (aside from the 1 cent authorized in the settlement) should be deemed compensation for the services relating to condensate and liquefiable hydrocarbons. Phillips-Kerr-McGee moved to dismiss or stay the action (R. 3560-3564), contending that the Commission had primary jurisdiction. These motions were denied. While the Illinois court granted the motion sought by Phillips-Kerr-McGee directing Jupiter to pay 17.1 cents without insisting on an endorsement that this represented the full amount due, it denied without explanation a request that the 1.4 cents in dispute and being held by Jupiter be placed in escrow (R. 3711).[4]

In its District Court suit against Union, Jupiter argued that it was still entitled to 3.4 cents per Mcf. Union brought in Tennessee as a third party defendant (R. 3619-3626) and Tennessee, with Union's acquiescence, successfully moved (R. 3627-3637) for suspension of the suit pending resolution of the dispute by the Commission (R. 3722-

[4] We are advised that Jupiter resisted this request on grounds having nothing to do with the merits. Counsel for Phillips-Kerr-McGee have informed us that they will reproduce Jupiter's opposing memorandum as part of their brief here.

3725), asserting that the Commission had primary jurisdiction as to some of the matters in issue.

Phillips-Kerr-McGee (R. 3544-3549, 3571-3574) and Tennessee (R. 3440-3448, 3610-3612, 3638-3639) filed motions with the Commission requesting it to enforce its orders against Jupiter (and Union, in Tennessee's petition).

Issuance of the Orders Under Review.—In response to these petitions, the Commission issued a declaratory order on April 3, 1968 (R. 3728-3739). It held that Union, since May 15, 1966, was and had been required to pay Jupiter 1.0 cent per Mcf and authorized to charge Tennessee no more than 1.0 cent over and above its base rate. As to Phillips-Kerr-McGee, the April 3 order held that Jupiter was and had been required to pay their prescribed certificate rates of 18.5 cents (since August 11, 1965) and could charge Tennessee 19.5 cents for the gas concerned, this authorization dating from May 15, 1966. The Commission made it clear that it was not concerned with compensation for services other than the transportation of that part of the gas stream delivered to Tennessee (R. 3735):

> We do not believe any public interest objective would be achieved by our attempting to resolve such contractual issues. This is an area in which we possess no special expertise which would be applicable in any subsequent judicial proceedings. * * * Moreover, in the present situation any judicial remedy available to Jupiter may well be a matter of equity rather than of law. It is, we believe, sufficient here to note that, under the Natural Gas Act, transportation of such portions of the natural gas stream received by Jupiter from Phillips-Kerr-McGee, but not resold to Tennessee, is just as much subject to our jurisdiction as the remaining portion of the gas stream, even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids. * * * This means that, even if it were to be determined that Jupiter was contractually entitled to reimbursement for the transportation services it provides for Phillips-Kerr-McGee, it would not be entitled to payment therefor unless and until it secures a certificate for such transportation at an appropriate rate. * * *

The Commission also recognized that, in addition to reimbursement for the jurisdictional transportation of condensate and liquefiable hydrocarbons, Jupiter claimed entitlement to reimbursement for some nonjurisdictional services. But it made clear that, irrespective of the eventual resolution of these claims (R. 3739):

> Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latter's prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56, respectively.

On May 24, 1968, the Commission denied the rehearing sought by Jupiter and Union (R. 3821-3824). With respect to Jupiter's set-off claim, the Commission held (R. 3823) that any payments that might be due for alleged nonjurisdictional revenues "may not be commingled or confused with the amounts due for jurisdictional services in Jupiter's accounts." The Commission also reiterated its jurisdiction over the transportation of the entire gas stream and pointed out that "the major function which Jupiter was to perform under the contracts was the transportation of gas from the offshore platforms * * * to the Tennessee pipeline, and that the vast bulk (if not all) of the rates * * * was intended to serve as recompense for that service." (R. 3822). Union's arguments on rehearing were repetitions of its earlier insistence on reimbursement for all Jupiter's charges and its nonparty status in the Jupiter settlement. These were rejected (R. 3823-3824).

On July 1, 1968, Phillips-Kerr-McGee filed a motion complaining that Jupiter was continuing to offer it only 17.1 cents, rather than the 18.5 cents prescribed (R. 3825-3832). This motion was renewed on October 16, 1968 (R. 3841-3852). In response to these motions, the Commission issued an order on December 13, 1968, which is under review in No. 22693.[5] That order (one Commissioner dissenting) after noting that "it seems plain that no more explicit

[5] Union's petition for review is not concerned with this order.

order could be directed to Jupiter than those previously addressed to it'' (R. 3871), held that

> * * * the only satisfactory method by which the integrity of our order can be maintained, pending the resolution of the proceeding to review our order of April 3, 1968, is an order directed to Tennessee as well as Jupiter.

Thus the Commission ordered Tennessee to pay 18.5 cents directly to Phillips-Kerr-McGee on Jupiter's account, and 1.0 cent to Jupiter. Jupiter was also directed to pay over to the producers the difference between the sums it had paid for gas since the 1966 settlement order and the price of that gas at 18.5 cents per Mcf. The Commission noted that it would stay this order, if this Court determined that a stay of the April 3, 1968, order were appropriate. Jupiter's subsequent request for such a stay was denied by this Court.

Jupiter applied for rehearing of this order contending, *inter alia,* the Phillips-Kerr-McGee motions requesting the Commission to take enforcement steps had been denied automatically under the Commission's regulations because they had not been acted on within thirty days; that the Commission could not control the ''spread'' retained by Jupiter on the gas bought from Phillips-Kerr-McGee and sold to Tennessee; and that the Commission had no power to ''modify'' the April 3 order as to which a review proceeding was pending in this Court. Tennessee sought a clarification of some aspects of the December 13 order. On January 22, 1969, the Commission denied Jupiter's application for rehearing and also discussed the matters raised by Tennessee (R. 3903-3910). As to Jupiter's claims noted above, the Commission stated that its regulations did not provide for automatic denial of motions of the type made by Phillips-Kerr-McGee after 30 days, noting that the section Jupiter referred to ''by its terms, refers only to motions made during hearings, not after the entire matter has been submitted to the Commission'' (R. 3905). As to the ''spread'' contention, which it had unsuccessfully advanced before, the Commission observed (R. 3905) ''that the con-

tract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the rate of natural gas to Jupiter and is subject to our jurisdiction as such. Jupiter may not evade its obligation to pay the filed rate by offsetting other contract claims against such jurisdictional rates." The Commission rejected as baseless the claim that the December 13 order modified the earlier orders, noting (R. 3906) that it "merely enforced the certificate order of August 11, 1965 [prescribing the Phillips-Kerr-McGee 18.5 cent rate] and the settlement order of June 28, 1966, as clarified by the order of April 3, 1968. No conclusions reached by the April 3 order were modified, nor were any responsibilities imposed thereby varied."

ARGUMENT

I. THE COMMISSION'S DETERMINATION OF JUPITER'S PAYMENT OBLIGATION FOR GAS PURCHASED FROM PHILLIPS-KERR-McGEE AND THE REQUIREMENTS FOR COMPLIANCE ARE SOUND

A. The Commission's Refusal To Permit Jupiter's Claimed Set-off Against the Phillips-Kerr-McGee Prescribed Rate of 18.5 Cents Is Well Founded

Jupiter's first argument is that, contrary to the Commission's orders, it may deduct (as it has done in the past) amounts it asserts are due it for transportation and other services with respect to condensates and liquefiable hydrocarbons from the 18.5 cent rate legally in effect for Phillips-Kerr-McGee gas sales to it. The Commission's conclusion that such a set-off was improper was fully justified.

Since the Commission's Opinion 470, which dealt with the Phillips-Kerr-McGee rate to Jupiter, was issued in 1965, *supra*, p. 6, 18.5 cents has been the legally prescribed rate to be collected by Phillips-Kerr-McGee from Jupiter for the gas sold to it. From the time of that opinion until after the settlement of Jupiter's rates was approved in 1966, Jupiter paid Phillips-Kerr-McGee 18.5 cents for the gas purchased. In its initial offer of settle-

ment in 1966, it plainly recognized this as the proper price, stating (R. 3346) that the price to Tennessee it was then proposing would be subject to upward or downward revisions in the amount that "the Phillips-Kerr-McGee price is permitted or required by the Commission to be increased above or below the 18.5 cent per Mcf price established in Opinion 470." And in its amended offer of settlement it stated (R. 3372) that the 19.5-cent price it was proposing to charge Tennessee would be "subject to change only in the event and to the extent that a valid action by the Federal Power Commission authorizes a price for gas sold by Phillips-Kerr-McGee to Jupiter at a level different from 18.5 cents per Mcf."

After the settlement was approved, Jupiter, notwithstanding its express recognition in the settlement offers that 18.5 cents was the prescribed rate for the Phillips-Kerr-McGee gas rates to it until changed by Commission action, ceased paying Phillips-Kerr-McGee the 18.5 cent rate applicable to its gas sales to Jupiter even though no filing had been made to change the Phillips-Kerr-McGee rate specified in Opinion 470. It is, of course, well established that even contractually specified rate changes cannot become operative under the Natural Gas Act without the filing of a notice of change. See, *e.g. Sunray Mid-Continent Oil Co.* v. *F.P.C.*, 364 U.S. 137, 153 (1960); *Episcopal Theological Seminary* v. *F.P.C.*, 106 AppDC 37, 42-44, 269 F. 2d 228, 233-235, certiorari denied *sub nom. Pan American Petroleum Corp.* v. *F.P.C.*, 361 U.S. 895 (1959); *Bel Oil Corp.* v. *F.P.C.*, 255 F. 2d 548, 554 (CA5), certiorari denied, 358 U.S. 804 (1958); *Mississippi Power & Light Co.* v. *Memphis Natural Gas Co.*, 162 F. 2d 388 (CA5), certiorari denied, 332 U.S. 770 (1947).

Without ever seeking to compel Phillips-Kerr-McGee to change the 18.5 cent rate for its gas sales, Jupiter simply set off 1.4 cents per Mcf, which it claims represents the amount the producers are contractually obligated to pay it for transportation and other services performed for them. These contractual claims of Jupiter are in issue in the Illinois State courts. Whatever their validity, the

Commission's disapproval of Jupiter's disregard of the prescribed rate is fully consonant with the well-established principle that a prescribed or otherwise legally filed rate must, as a matter of law, be observed by all parties. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951); *Louisville & Nashville R. R.* v. *Central Iron & Coal Co.*, 265 U.S. 59 (1924); *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *United States* v. *Associated Air Transport, Inc.*, 275 F. 2d 827 (CA5, 1960) and cases cited therein. This remains true whether or not the parties have other contractual rights and duties toward one another, or if there are asserted to be equitable considerations against payment of the full rate. *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478 (1939).[6]

A particularly apposite case is *Northeast Airlines, Inc.* v. *C.A.B.*, 345 F. 2d 662 (CA1, 1965). Northeast unsuccessfully sought CAB sanction for an arrangement whereby it would set off against debts to equipment suppliers transportation (at tariff rates) performed for these creditors. It argued on review that the cancellation of these debts was equivalent to payment in cash for the transportation, but the court held, relying on *Louisville & Nashville R.R.* v. *Mottley*, 219 U.S. 467 (1911) and *Chicago, I. & L. Ry. Co.* v. *United States*, 219 U.S. 486 (1911), that transportation could not be rendered otherwise than for cash payment at the filed rate.

The soundness of the Commission's position is emphasized by the fact that the amounts assertedly owed Jupiter, to the extent that they exist at all, are completely

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6 We recognize that a legally filed rate may be retrospectively changed if it was subject to certain contingencies. Thus, where the rate charged has been based on a state minimum price later invalidated, *ab initio*, the difference between the state minimum price and the lower contract rate could be recouped by the purchaser (*e.g.*, *Pan American Petroleum Corp.* v. *Kansas-Nebraska Natural Gas Co.*, 297 F. 2d 561 (CA8), certiorari denied, 370 U.S. 937 (1962)). Similarly, if a contract rate permits recovery from the purchaser of certain taxes later found invalid the filed rate would be adjusted retrospectively to the date from which the invalidity was determined. But this possibility of retrospective adjustment provides no basis for not paying in the first instance the rate on file.

speculative. Jupiter claims as compensation for assertedly non-jurisdictional services the entire 1.4 cent contractual excess over the 1.0 cent allowance prescribed by the Commission for transportation of gas. Leaving aside the question whether transportation of condensates is jurisdictional, as the Commission has found (in which event Jupiter must secure a certificate from the Commission before it can lawfully charge any fee authorized by the contract for such transportation), it seems highly unlikely that a court would award Jupiter 1.4 times as much money for these relatively minor services as for the major function it performs, *i.e.*, transportation of gas to Tennessee's pipeline. Of the gas stream passing through Jupiter's pipeline from Phillips-Kerr-McGee's wells, only some 5 percent at most, and possibly no more than 1.5 percent, would fall into this allegedly non-jurisdictional category (R. 1236, 3735). Jupiter itself, in proposing the settlement, recognized that it would be able to collect no more than the Commission allowed it as "spread" without a reformation of its contract to allow separate recovery for the allegedly non-jurisdictional activities (R. 3338, 3343). Thus, in its original offer to settle its rate case it proposed a reformation of its contracts with the producers to permit it to receive 0.25 cent per Mcf for the services it states are nonjurisdictional, while receiving 1.25 cents for the transportation of gas sold to Tennessee (R. 3346-3347).

The litigation in progress in the Illinois court certainly compelled no different conclusion. The Commission's orders in no way limit the power of the Illinois court to dispose of the questions within its jurisdiction. An order by that court holding Phillips-Kerr-McGee contractually bound to pay a certain amount for these services can exist side-by-side with a Commission order to Jupiter to pay the filed rate for gas. That the theoretical *net* effect of such a situation could be to reduce Jupiter's total payments to Phillips-Kerr-McGee somewhat does not justify a departure from the filed rate, which would remain 18.5 cents regardless of the outcome of the Illinois litigation.

Nor does the fact that the Illinois court has denied the Phillips-Kerr-McGee request to order Jupiter to place the

disputed 1.4 cents into an escrow account support Jupiter's claim that such action constituted a decision by that court on the merits of the present controversy. That denial, issued without opinion on a preliminary motion (R. 3838), cannot be reasonably presumed to represent more than a judgment that such a remedy was not necessary to protect Phillips and Kerr-McGee pending the conclusion of the contract litigation. Indeed, Jupiter in opposing the escrow request simply argued that such a requirement was not authorized as a condition for bringing suit. See, *supra*, p. 10, n. 4. It is impossible to infer from the court's action any judgment that Jupiter had a better right to possession of the fund than Phillips-Kerr-McGee. Nor did the order of the Illinois court determine whether or not Jupiter was to pay the filed rate, a question properly within the competence of the Commission rather than of a state court in which the controversy was solely one of contract rights. The filed rate doctrine, so far as we can ascertain, was not even presented in the papers relating to the escrow request.[7]

Jupiter's reliance on *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), is also misplaced. It contends that under that case the Commission "cannot order that the contractual rate *must be increased.* [sic] without the consent of both parties to the contract." (Br. p. 21.) But the underlying assumption of this argument that Phillips-Kerr-McGee have no contractual right to charge 18.5 cents for the gas they sold Jupiter for resale to Tennessee is, as found by the Commission, unsound and not open to Jupiter here. The Commission in Opinion No. 470 in 1965 expressly held Phillips and Kerr-McGee

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7 Jupiter's own quotation from *Southern Pacific R.R. Co.* v. *United States*, 168 U.S. 1 (1897) (Jupiter's Br. pp. 19-20) sufficiently disposes of its argument that the Commission is barred by *res judicata:* "The general principle * * * is that a right, *question or fact distinctly* put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between *the same parties or their privies* * * *." [Emphasis added.] Plainly, the Commission, not being a party in the Illinois case, is not barred from reaching a different decision on a public law question not even in issue in the state court.

were authorized "to receive 18.5 cents for their Rollover sales to Jupiter" (34 FPC at 489); the 2.4 cents per Mcf additional Jupiter was there authorized to charge for the gas it resold to Tennessee was solely pending resolution of the proper transportation charge in the Section 5(a) proceeding then in progress to fix the just and reasonable rate for Jupiter's sale to Tennessee. Jupiter, having subsequently agreed in the settlement of the Section 5(a) proceding that this charge should be 1 cent (so that its charge to Tennessee would be 19.5 cents per Mcf so long as it was paying 18.5 cents for the gas) cannot now contend that this settlement affected Phillips-Kerr-McGee's contractual rights to secure 18.5 cents per Mcf for their gas.[8]

B. The Commission's Order of December 13, 1968, Provided an Appropriate Means of Enforcing Jupiter's Previously Determined Obligations To Pay Phillips-Kerr-McGee 18.5 Cents

Notwithstanding the plain language of the Commission's April 3, 1968, and May 24, 1968, orders (1) that Jupiter has, since August 11, 1965, been obligated to pay Phillips and Kerr-McGee their prescribed certificate rate of 18.5

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8 Jupiter's recognition at the time of settlement that Phillips-Kerr-McGee would continue to be entitled to 18.5 cents was fully consistent with the filed contracts. The Phillips and Kerr-McGee contracts with Jupiter which are filed as Commission rate schedules, specify (*e.g.*, R. 1539-1541) that the price for gas delivered to Jupiter (the successor to "Marine" which is referred to in the contract) will be equal to the price per Mcf "provided to be paid" by Tennessee (assignee of Niagara which is referred to in the contract) "regardless of whether or not such price is actually paid," less an amount based on the volumes purchased. This contractual spread, as noted previously, had amounted to about 2.4 cents per Mcf before the settlement order. The contract price under the Jupiter-Tennessee contract remains 22.8333 cents per Mcf although the Commission, pursuant to Opinion 470, issued Jupiter a temporary certificate permitting a charge of no more than 20.9 cents and under the settlement limited the price to 19.5 cents. Thus, prior to the settlement Phillips and Kerr-McGee had a contract basis for charging 20.4333 cents (R. 1602), although the Commission, under its certificate authority, permitted a price of only 18.5 cents in Opinion 470. Jupiter states (Br. p. 6) that this contract spread of 2.4 cents is to be subtracted from the amount it "receives" from Tennessee, *i.e.*, 19.5 cents. But the contract on file with the Commission does not, as we have noted, so specify. Moreover, as the examiner noted in his decision leading up to the settlement (R. 3169, 35 FPC at 1121-1122), the contract provides that if the spread is reduced, the price to the producers shall be increased by the amount of the reduction (R. 1582-1583).

cents per Mcf and (2) that other claims could not be offset against or commingled with such amounts (R. 3739, 3823), Jupiter, while not seeking a stay of these orders, continued to withhold 1.4 cents per Mcf in its payments to the producers. Thereafter, upon the motion of Phillips and Kerr-McGee, the Commission, in order to protect the integrity of its earlier orders, adopted temporary procedures to assure compliance. It directed Tennessee, to whom the Phillips-Kerr-McGee gas sold to Jupiter was resold, prospectively to pay 18.5 cents per Mcf directly to the producers on Jupiter's account, while paying one cent to Jupiter directly.[9]

Jupiter's claims (Br. pp. 24-28) that these requirements improperly modified existing contractual obligations are without substance. Initially, it argues that this order increases its contract price to the producers from 17 cents to 18.5 cents. But on its face the Commission's December 13 order merely implements the earlier order of April 3 and May 24, which as discussed, *supra*, pp. 11-12, had declared that the legal filed rate of the producers for gas sold to Jupiter was 18.5 cents. Whatever the validity of the Commission's action there, the December 13 order did not make any change in this respect.

Jupiter, stating (Br. p. 24) that the December 13 order requires Tennessee to purchase directly from Phillips and Kerr-McGee, makes the unfounded claim that this action violates the "filed rate" doctrine. Both halves of this proposition are in error; the action taken was the only way by which the "filed rate" doctrine could be enforced. In fact, the Commission's December 13 order has not directed Tennessee to purchase directly from Phillips-Kerr-McGee. Rather, the Commission merely adopted a temporary procedure whereby Tennessee, in view of Jupiter's complete disregard of the Commission's earlier directive, pays Phillips-Kerr-McGee their filed rate on "Jupiter's account" (R. 3876). This plus the one cent per Mcf to be

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[9] The Commission also specified that Jupiter must, for the past period, pay to Phillips and Kerr-McGee the difference between the 18.5 cent filed rate and the lower price paid as a result of Jupiter's unauthorized set-off.

paid directly to Jupiter by Tennessee results in a payment to Jupiter (or its account) of the full 19.5 cents specified in its rate on file with the Commission. Thus, both Jupiter and Phillips-Kerr-McGee receive their filed rates.

Jupiter's further contention (Br. pp. 27-28) that the Commission's method of enforcing its April 3 order (which had not been stayed) was invalid because the Commission might have sought an order requiring compliance in a United States District Court pursuant to Section 20 of the Natural Gas Act is palpably unsound.[10] Section 20, to be sure, permits the Commission to seek judicial assistance in enforcing its orders and the provisions of the Act where its own power over the necessary parties is incapable of achieving proper compliance. But neither the language nor purpose of the Act even suggests that Section 20 is intended to be an exclusive means of achieving compliance or to restrict the Commission's authority under Section 16 to "issue * * * such orders * * * as it may find necessary or appropriate to carry out the provisions" of the Act, which has been broadly construed to permit practical and effective administration of the Gas and Power Acts. See, *e.g., F.P.C.* v. *Tennessee Gas Transmission Co.,* 371 U.S. 145, 154-155 (1962); *F.P.C.* v. *Texaco Inc.,* 377 U.S. 33 (1964); *Permian Basin Area Rates Cases,* 390 U.S. 747, 776, 780, 797 (1968); *Niagara Mohawk Power Corp.* v. *F.P.C.,* 126 AppDC 376, 379 F. 2d 153 (1967); *Public Service Commission of New York* v. *F.P.C.,* 117 AppDC 195, 327 F. 2d 893 (1964). In the *Niagara Mohawk* case, this Court in affirming the Commission's authority to backdate licenses for hydroelectric projects, discussed Section 309 of the Power Act, 16 U.S.C. 825h, which is parallel to Section 16 of the Gas Act, at some length, explaining, *inter alia,* 126 AppDC at 381, 382, 379 F. 2d at 158-159:

> * * * While such "necessary or appropriate" provisions do not have the same majesty and breadth in

[10] Section 20(a) (*infra,* p. 44), provides that the Commission "may in its discretion bring an action" to obtain compliance with the Act or Commission orders.

statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutiae, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.

* * * * *

Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives * * * [footnote omitted].

In the present case, the remedy fashioned by the Commission was particularly appropriate since the 1966 settlement being enforced had made it clear that Jupiter was intended to charge Tennessee only one cent more than it paid Phillips-Kerr-McGee for the gas purchased. Since all the parties to the transaction are natural gas companies within the Commission's jurisdiction and parties to the proceeding, the Commission was capable of fashioning a remedy that was likely to lead to prompt compliance with the provisions of the Act.[11]

Jupiter also contends (Br. pp. 46-47) that the December 13 order improperly modified the orders of April 3 and May 24, because this Court had already acquired exclusive jurisdiction "to affirm, modify, or set aside" those orders by virtue of the filing of the record. This claim, as the Commission noted in denying rehearing (R. 3906), is misconceived; the December 13 order does not in any way alter the responsibilities imposed by the April 3 or May 24 orders. At most it specified a somewhat dif-

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11 In so doing, the Commission not only took express cognizance of the review proceedings pending as to the April 3 and May 24 orders but provided for a temporary stay of its enforcing order if Jupiter sought a stay of the earlier orders (R. 3876-3877). The stay thereafter sought from this Court was denied.

ferent method of enforcing the responsibilities arising from Opinion No. 470 and the 1966 Jupiter settlement. Thus it is plain that (absent a stay, which has been requested and denied in this case) the Commission at no time lost its authority to implement such orders though it could not alter their substance. See *Dyer* v. *S.E.C.*, 289 F. 2d 242 (CA8, 1961).

II. THE COMMISSION'S RULING THAT TENNESSEE WAS TO COMPENSATE UNION ONLY FOR SUCH CHARGES BY JUPITER AS WERE ATTRIBUTABLE TO TRANSPORTATION OF GAS TO TENNESSEE WAS CORRECT

The petition of Union presents separate issues. Union's principal contention is that the Commission erred in holding that under the 1962 Pure (now Union) settlement and the Pure-Union rate schedule amendment filed in compliance therewith it may collect from Tennessee only so much of the charges paid by Union to Jupiter as relate to transportation of gas actually sold and delivered to Tennessee. While those transportation charges have admittedly been limited to one cent since Jupiter's 1966 settlement, Jupiter in its District Court action in Illinois is claiming it is entitled to an additional amount for transportation, separation, and storage services it performs for Union with respect to that part of the gas stream not sold to Tennessee. The claimed amount would be about 2.4 cents per Mcf times the total amount of gas carried by Jupiter for Union. Union contends that all the sums it pays, or might be required to pay under the contract, including those for transportation of portions of the gas stream not reaching Tennessee and for separation and storage of condensates, should be charged to Tennessee. The Commission's action in rejecting this contention was fully consistent with the previous contractual arrangements of the parties. Union also argues it should have been afforded a hearing.

A. The Commission Conclusion That Union's Rate to Tennessee Could Include Only 1 Cent for Transportation Charges Was Consistent With the Pure Settlement and Compliance Rate Filing

In its attack on the Commission's order, Union asserts (1) that the Commission ignores the Pure-Tennessee contract amendment, which it entered into to comply with the 1962 settlement, and (2) that the Commission misinterpreted the settlement itself. It insists, and we do not disagree, that the 1962 contract amendment represents the filed rate which must be observed by both parties, until changed by appropriate Commission action. But these documents whether viewed separately or in context do not support Union.

Prior to the 1962 settlement which dealt with most of Pure's sales, including the one here at issue, Pure made its Rollover sale of gas to Tennessee at a flat contract price of 21.3333 cents per Mcf.[12] While Pure under a separate contract paid Jupiter to transport this gas from its offshore platform to Tennessee's lines, the contract price to Tennessee was not geared to the transportation charges Pure paid Jupiter.

The settlement proposed by Pure substituted a two-part rate for the gas sold to Tennessee, *i.e.*, a base price of 16.75 cents (with provisions for later escalation) plus reimbursement for the actual payments by Pure to Jupiter "for transportation" (R. 2541, 2555). It was agreed that any reduction in the transportation charges by Jupiter would reduce payments by Tennessee to Pure (R. 2555). While nothing in the settlement agreement in terms spelled out that this referred to the transportation of the gas actually delivered to Tennessee, this was a reasonable construction particularly since the two-part price being agreed to was for a sale of gas for which Tennessee was then paying a flat price that could not have been justified ratewise if the proceeding had gone to decision on the basis of Union's costs for services not related to Tennessee's gas.

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12 The rate was being collected subject to refund.

This construction of "transportation" was precisely the Commission's understanding of the Pure proposal in the order approving the Pure settlement in 1962. There it stated (R. 2613, 28 FPC at 891):

> At the present time, Pure makes the *sale* [of gas] from Rollover directly to Tennessee onshore * * *. It proposes a settlement rate of 16.75¢ per Mcf, plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of *the gas* onshore * * *. [Emphasis added].

While Union claims (Br. p. 17) that the Commission placed undue emphasis on this approval order, that order provides a controlling gloss on the settlement proposal and plainly shows that the only transportation charge approved by the Commission was for "the gas" sold to Tennessee. Pure did not then challenge the Commission's interpretation of its settlement.

The amended contract between Pure and Tennessee which Pure filed to comply with the settlement is also consistent with this reading. It provides (R. 1983-1984) that the "prices to be paid by Buyer to seller for all gas delivered * * * shall be the sum" of a flat charge per Mcf (initially 16.75 cents per Mcf) plus

> (b) The average payment in cents per Mcf paid to The Jupiter Corporation by The Pure Oil Company *for gas transported*, which shall be determined monthly by dividing the total payment made by The Pure Oil Company to The Jupiter Corporation by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4¢) per Mcf for the first sixty-two thousand, five hundred (62,500) Mcf per day and three cents (3¢) per Mcf on additional volumes. [Emphasis added.]

The first sentence of the quoted provision, like the settlement offer, does not unambiguously specify that the payment is only for the gas transported and sold to Tennessee.

However, this is the only possible meaning of the provision since the two parts of the rate schedule seek to provide a per Mcf price for the gas sold to Tennessee. Union so concedes (Br. p. 16).

Nevertheless, Union contends (Br. p. 16) that while Tennessee will only pay for the gas transported to it, the payment under the settlement and compliance rate schedule must be at the same rate per Mcf that Union pays Jupiter even if the permissible F.P.C. rate for Jupiter's gas transportation were less than Union's overall contract obligation.[13] In this respect, it asserts that the provision in the amended contract which provides that the gas transportation rate should be computed by reference to the "total payment made by The Pure Oil Company to the Jupiter Corporation * * *" has reference to the total payment for all services rendered by Jupiter. This begs the basic question of "total payment" for what services. There is no basis for assuming that the price for transporting gas to Tennessee included in Union gas rate to Tennessee was to be measured by the rate for any services other than that applicable to Jupiter's services in providing this transportation. The reference to "total payment," while perhaps ambiguous, would most reasonably apply to the total payment for Jupiter's transportation of gas to Tennessee. Since the Jupiter transportation charge was then a sliding scale charge (4 cents for the specified volumes and 3 cents for additional volumes), the reason for not stating a specific per Mcf charge is apparent.

Union's claim that the "total payment" was to be not only for that transportation service but also for the transportation of portions of the gas stream to Union (*i.e.*, the condensate and liquefiable hydrocarbons) and the separation of the condensates—all of which are services for which compensation is contemplated in the Jupiter-Union con-

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13 As noted above, the Commission in the Jupiter settlement in 1966 in fact prescribed a one-cent rate for Jupiter's applicable rate schedule. Jupiter, contending that not all the services under its contract with Union are jurisdictional, has instituted suit in federal court in Illinois to permit it to charge its full contract rate in order to recompense it for those allegedly nonjurisdictional services.

tract (R. 1693-1694)—is to say the least strained. This is particularly so when viewed in light of Pure's settlement offers which at most refer to Pure's reimbursement for actual payments by Pure to Jupiter for "transportation." This does not in terms cover the non-transportation services Jupiter performs for Union under their contract. Since Tennessee was plainly not to be charged for these services, it is incongruous to assume that Tennessee was to be, however, charged for those transportation services not related to the gas sold to it. The much more reasonable construction is that the transportation charge referred to in the settlement was only that directly related to the gas sold to Tennessee—the gas being priced.

Union's reliance (Br. pp. 18-19) on the settlement offer language that the charges to be recouped from Tennessee will be "only those actually paid by Pure to Jupiter" or the "actual payments Pure makes to Jupiter Oil Corporation for transportation" is similarly without substance. For none of these phrases imply that *all* payments for whatever Jupiter services to Pure are to be charged to Tennessee. As we have discussed, the context of these provisions supports the Commission view that only actual payments for the transportation service relating to the gas sold to Tennessee are to be reimbursed. Once that charge was established at one cent in the 1966 Jupiter settlement, the Pure settlement required Union to reduce its charge to Tennessee to reflect only the actual payments to Jupiter for transporting that gas.

Union erroneously suggests (Br. pp. 24-25) that Tennessee's payment for four years after the 1962 Pure settlement at the same rate per Mcf that Jupiter billed Pure-Union supports its present position. During that period from the 1962 Pure settlement to the 1966 Jupiter settlement, Jupiter's filed rate for the gas transported to Tennessee and its contract rate were the same, about 3.4 cents per Mcf. Thus, during that period there would have been no basis for Tennessee to pay less than the 3.4 cent filed rate. After the Jupiter settlement the rate for transporting gas was reduced to one cent per Mcf; however,

Jupiter continued to bill Union at the preexisting rate of 3.4 cents per Mcf because of its claim for recompense for the allegedly non-jurisdictional services[14] rendered by it to Union. Assuming *arguendo* that such a differential in rates for different services could be established, the practice of Tennessee prior to the Jupiter settlement of paying Union the 3.4 cent per Mcf rate that Union pays Jupiter in no way supports continuation of that practice once different rates for different services were established.

Union's further claim (Br. p. 23) that the Commission's view that Tennessee was only intended to reimburse Union for the cost of transporting the gas purchased is inconsistent with treating as jurisdictional the transportation of condensates and liquefiable hydrocarbons is absurd. The Commission held that Jupiter's transportation in all those respects was subject to its jurisdiction. But this has no bearing on the interpretation of the 1962 settlement and Union's rate schedule; in that respect the critical question is for what services was Tennessee to make reimbursement. The Commission's conclusion, discussed, *supra*, pp. 24-27, that Tennessee was to reimburse Union only to the extent that those transportation services rendered by Jupiter benefit Tennessee in no way detracts from the jurisdictional status of transportation services benefitting Union. Whether or not Union may judicially be held to have any contract obligation to pay separately for those other services, which at most cost Jupiter little extra (R. 3822), is at issue in the federal court in Illinois. We may note, however, that Union obtains substantial revenues from selling the condensates and liquefiables which Jupiter transports for it as part of the gas stream.

Finally, Union takes exception (Br. pp. 13, 25) to the Commission's statement that it would be peculiar for Tennessee "to pay a producer for transporting on shore that part of the gas stream which Tennessee does not receive * * *." In this respect, Union assails the state-

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[14] The transportation in the gas stream of condensate and liquefiable hydrocarbons was held to be jurisdictional by the Commission.

ment's accuracy because it appears to be common practice for pipelines that purchase gas offshore and transport it through their own lines to deliver, as part of the gas stream, condensates and liquefiables to producers without specifically charging the producers for the use of the pipeline facilities. The Commission in the proposed Policy Statement referred to by Union has indicated that at least an allocation of such costs should be made so as not to burden the gas consumers. But the fact that pipelines may have contractually agreed, as Union notes, to such free carriage through their own lines where they not only know the costs involved but may have been able to include all of the transportation costs in their resale rates, is hardly any indication that a pipeline would agree to pay out sums for services rendered by another company that it obviously could not support in a rate case as related to its gas services. The Commission's assessment was plainly realistic.

B. The Commission Acted Properly in Issuing Its Orders Without Scheduling a Hearing

Union sets out a number of matters (Br. pp. 29-30) which in its view made it improper for the Commission to issue its April 3 order without a hearing. Recognizing that a party must ask for a hearing in order to be afforded one, it relies on a letter to the Commission (R. 3647) wherein it asked "that the Commission schedule its hearings in the captioned proceedings at the earliest possible date due to the growing procedural complexities of these complicated, multi-party proceedings, and the unabated inequities inherent in a further delay thereof." This hardly amounts to a request for a hearing but rather one for expedition.

In any event, none of the matters which Union represents that it would have raised at a hearing would have provided any basis for holding one. A hearing is required only to resolve actual disputes on matters of fact relevant to the case. See *Denver Union Stock Yard Co.* v. *Producers Livestock Marketing Association*, 356 U.S. 282 (1958); *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271

F. 2d 281 (CA8, 1959), certiorari denied, 362 U.S. 911 (1960). What Union says now that it would have shown fails to meet this standard. First, the Commission was already aware that Tennessee had been paying Union the full amount of Jupiter's charges. Union had so stated (R. 3457) and the Commission did not contest the truth of the statement. Second, Union says that it would have shown that Tennessee's payment for the services at issue was "most common". It has already been shown (*supra*, p. 29) that the commonplace arrangement Union refers to is one whereby interstate pipelines transport liquids free for producers, a quite different situation from the present case and hence of no assistance in construing the present contracts. Union has never suggested that pipelines have actually paid gatherers for transporting portions of the gas stream delivered to others. Third, Union states that it would have shown the minimal nature of the portion of the gas stream not sold to Tennessee. The details of Jupiter's operations were fully presented in the hearings leading up to the settlement so that the claimed evidentiary deficiency is non-existent. Indeed, the Commission recognized that the bulk of Jupiter's services rendered under the contracts related to the gas sold to Tennessee. While Union says the Commission overstated the non-Tennessee gas, the exact percentage is quite irrelevant to the issues in this case, though it may have a bearing on the contract reformation question involved in the private court suits. All parties agree that the costs of the other services involved are minimal, at best. The other matters Union refers to are concerned simply with the interpretation of the contract, which is a legal question on which an evidentiary hearing is unnecessary even if requested. *Mississippi River Fuel Corporation* v. *F.P.C.*, 108 AppDC 284, 281 F. 2d 919 (1960), certiorari denied, 365 U.S. 827 (1961), and cases therein cited.

Finally, it is incorrect to say, as Union does, that the orders under review effectively reduced Union's rate. Its rate, as has been pointed out, is composed of a base price plus "the average payment * * * to the Jupiter Corpora-

tion * * * for gas transported." Union was fully aware that a change in the latter component would change its revenues correspondingly and, indeed, had expressly indicated that to be the purport of the settlement (R. 2555). Thus, as long as Union's rate to Tennessee depends on the rate under Jupiter's FPC rate schedule, the reduction was automatically required under Union's filed rate.

III. THE COMMISSION'S DETERMINATION OF JURISDICTION OVER THAT PART OF THE GAS STREAM NOT DELIVERED TO TENNESSEE WAS CORRECT

Jupiter argues elaborately (Br. pp. 28-46) that the Commission should not have asserted jurisdiction over transportation of "liquid condensate". While Jupiter sets out its contentions in terms of "condensate" or "liquids" transportation, what the Commission in fact did was to hold that it has jurisdiction over "such portions of the natural gas stream received by Jupiter from Phillips-Kerr-McGee [and Union], but not resold [or delivered] to Tennessee * * * even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids" (R. 3735). This jurisdictional holding was both reasonable and consonant with the limits of the Commission's authority.

At the outset, this claim should be put into context. The Commission's determinations discussed in the preceding sections of the argument—*i.e.,* that Jupiter must pay Phillips-Kerr-McGee 18.5 cents until that rate is changed by Commission action and that Union may recoup only 1 cent per Mcf as the transportation component of its rate to Tennessee even if Union were obligated to pay Jupiter at a different rate for the overall services obtained—do not depend on whether the Commission properly determined that it has jurisdiction over the transportation of the entire gas stream including condensates and liquefiable hydrocarbons that may be extracted when this transportation has ended. The Commission's declaration in this respect was not, however, purely academic.

As has been pointed out, the present proceeding, as well as Jupiter's suits in the federal and state courts in

Illinois, arise from Jupiter's position that, as a matter of contract, it should be reimbursed for the transportation of the portion of the gas stream delivered to the producers for their own use and the separation of the condensates from this stream, in addition to the amount now allowed by the F.P.C. While the Commission did not believe it necessary to determine whether Jupiter might have any such contractual rights, it did deem it pertinent to point out that even if Jupiter prevailed in those contract controversies it could not collect separate amounts for the transportation of condensates and liquefiable hydrocarbons absent Commission certification of such service, including rate approval. Since Jupiter also claims, in its private contract suits, compensation for some services the Commission regards as non-jurisdictional, the Commission stated any such future administrative action would be aided if "any judicial determination that Jupiter is, as a matter of private obligation, entitled to any payments by Phillips-Kerr-McGee [or Union] would segregate any amount due for said transportation from any other obligations to Jupiter the producers may be found to have" (R. 3736, 3738). In these circumstances, it appears to us that the Commission decision is sufficiently concrete to permit review.

Jupiter, in challenging the Commission's jurisdiction over the full gas stream, argues that the condensates removed by or for the producers are not natural gas within the meaning of the Gas Act and that the Commission has no jurisdiction over portions of a natural gas stream not resold. These positions are without merit.

A. The Entire Stream Transported by Jupiter Constitutes "Natural Gas" for Purposes of Defining the Commission's Jurisdiction

Jupiter urges (Br. pp. 28-36) that the Commission is without jurisdiction to deal with the condensate component of its transportation activities because liquid condensate is not natural gas within the meaning of the Act. Not only do the cases show that the Commission has jurisdic-

tion over the entire commingled stream even though a portion thereof is ultimately not resold as gas, but it should be noted in this connection that there is no very sharp dividing line in a natural gas pipeline between substances transported in gaseous form and those transported as liquids.[15] Whether a particular hydrocarbon is in a gaseous or liquid state depends on temperature and pressure; the higher the pressure and the lower the temperature, the larger the proportion of liquid.[16] The state of the various hydrocarbons will vary, therefore, with temperature and pressure conditions inside the pipeline, and it will be impossible to tell what proportions of the gas stream are being transported as gas, as a mist or spray, and as a film of coherent liquid on the walls or bottom of the pipe.

The Commission's jurisdiction over a full stream of gas, including entrained liquids not used by the pipeline for resale was, as the Commission noted (R. 3823), only recently affirmed by the Supreme Court in the *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968). It is common practice in the Permian Basin for producers to sell casinghead gas, including entrained liquids, to a pipeline which pays the producer a percentage of the proceeds from the extracted liquids, plus a fixed price for the residue gas. The examiner would have fixed a flat price for the casinghead gas, including liquids, without permitting separate payment for the liquids on the percentage basis. 34 FPC 159, 369. The producers objected on the ground that the sale of the liquids in the gas was not within the Commission's jurisdiction. The Commission in rejecting the producers' jurisdictional claims observed (*Id.,* at 209):

> We believe the presiding examiner was correct in holding that the sale of the casinghead gas to the pipe-

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15 Actually condensate may be transported as a "fog" or "mist," as undoubtedly is much of the condensate here in question. While this is in "liquid" form, since a fog is composed of very small droplets, it is dispersed throughout the gas.

16 The separator used to remove condensate from gas works on this principle. Zaba and Doherty, *Practical Petroleum Engineers' Handbook* (4th Ed. 1956), p. 643.

> line under the Spraberry type contract is subject to Commission jurisdiction, and that this Commission has the power to regulate the price for the raw gas purchased even though it may include the heavier molecules which can easily be liquefied. * * * The Commission has no jurisdiction over the price at which liquids are sold but if payment for the raw stream is made in whole or in part on the basis of a percentage of liquids or liquid revenues, the Commission may still consider the liquid credits in controlling the amount of payment for the gas.

The Supreme Court expressly affirmed this conclusion. 390 U.S. 747, 820, fn. 111.

Jupiter attempts to skirt this holding by pointing out that the Commission disclaimed jurisdiction over the price received by the producers for the liquids, and arguing that the Supreme Court did not deal with charges for transportation of liquids. (Br. p. 44.) But the importance of the *Permian* holding for this case lies in the fact that the Commission's express exercise of jurisdiction over the *sale* of the entire stream of gas, including entrained liquids, was approved.[17] By the same token the Commission has jurisdiction over the entire stream being transported. Here, as in *Permian,* the fact that part of the stream is ultimately sold separately as liquids does not affect the Commission's jurisdiction so long as the liquids or liquefiables remain as part of the stream.

Deep South Oil Co., 14 FPC 83 (1955), affirmed, 247 F. 2d 882, 900, 903 (CA5, 1957), certiorari denied, 355 U.S. 930 (1958), is another example where the Commission's jurisdiction over the entire stream of gas, including liquid and liquefiable hydrocarbons, has been judicially sustained. Jupiter's assertion (Br. pp. 42-43) that the *Deep South* case did not involve liquid condensate cannot be supported. It is true that some liquid substances were removed from the casinghead gas before it was sold (14 FPC 308, 311-312); but it is equally clear that some others remained and were sold along with the gaseous part

[17] The Supreme Court recognized there that the liquid proceeds were part of the producers' revenues for jurisdictional sales of gas.

of the stream. Thus the examiner found (14 FPC at 313) that the Deep South contract provided

> * * * [T]he gas shall be delivered in a full stream in its natural state without the extraction therefrom of gasoline or other liquefiable hydrocarbons.

In describing the movement of the gas stream after delivery to the buyer, the examiner stated (*id.* at 313):

> The gas which is produced at each of Deep South's wells passes through small lines into a larger line * * *. The larger line is, in turn, interconnected with a still larger line which extends from the LaBelle field into the Winnie Plant. * * *
>
> At the plant the gas flowing in through the LaBelle-Winnie line, together with that from the high pressure lines from other fields, flows into a high-pressure header. From there it flows into a separator, and then into an absorber. In the absorber, the gas *and the liquid hydrocarbons which are in association with the gas* move in at the bottom and rise to the top. As they do so, absorption oils flowing in at the top and moving downward absorb the liquid hydrocarbons. In this process, a part of the butanes and propanes, practically all of the pentanes and the heavier hydrocarbons are eliminated from the gas. * * * [emphasis added, footnote omitted].

The clear implication of this discussion is that there were liquid products in the stream sold to the pipeline, and that they were considered part of the jurisdictional sale. Indeed, Judge Brown's dissenting opinion makes it clear that such constituents of the stream were sold (247 F. 2d 882, 899).[18]

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[18] The cases on which Jupiter relies do not support its position. Without exception, they deal with disputes between parties to oil and gas leases, involving questions as to the ownership of substances produced or the continued existence of the leasehold interest. With the possible exception of *Navajo Tribe of Indians* v. *United States*, 364 F. 2d 320 (Ct. Cl., 1966), there was no public interest issue present; and none of the cases involved construction or application of the Natural Gas Act. The *Navajo Tribe* case illustrates the unreliability of "general law" definitions of natural gas as applied to problems under the Natural Gas Act. As Jupiter points out (Br. p. 31), the Court of Claims included helium in a grant of "all the oil and gas

B. Commission Jurisdiction Over Portions of a Natural Gas Stream Not Resold Is Well Supported by Authority, as Well as by the Policy of the Natural Gas Act

Jupiter also argues strenuously (Br. pp. 40-42) that the Commission has no jurisdiction over its transportation of portions of the gas streams that are not resold as gas to Tennessee. But it is clear that, as was said in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 359 F. 2d 675, 682 (CA8, 1966), that "the Commission has certificate jurisdiction over the 'transportation' of gas in interstate commerce even where the 'sale' of the gas may not be jurisdictional, such as direct sales to industrial customers." See also *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961). The fact that the part of the natural gas stream at issue in cases like these was not to be utilized by any retail consumers, including the pipeline purchaser, has not barred the Commission from exercising jurisdiction. It is also clear that the Commission may regulate the transportation rate when it certificates a transportation service as such. Sections 4 and 5 of the Gas Act in terms grant the Commission rate jurisdiction not only over sales but transportation as well. Indeed, Jupiter does not challenge the exercise of the Commission's rate jurisdiction over its transportation service to Union where no sale by Jupiter is involved. See *Transcontinental Gas Pipe Line Corp.*, 33 FPC 237 (1965), affirmed *sub nom. Public Service Electric and Gas Co.* v. *F.P.C.*, 371 F. 2d 1 (CA3, 1967), certiorari denied, 389 U.S. 849 (1968).

The *Panhandle Eastern* case, *supra*, is of particular interest in this respect. It concerned the certification of a proposal to run Panhandle's natural gas stream, which contained certain quantities of helium, through a helium

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deposits", since the helium was in a gaseous condition. But it is quite clear that helium would *not* be included in natural gas as that term is used in the Act. See pp. 37, 38, *infra*. For reasons already explained, it is consonant with both the authorities and the policy of the Natural Gas Act that the entire stream transported through a regulated pipeline be subject to regulatory jurisdiction. It is therefore particularly inappropriate to make the Commission's jurisdiction depend upon an accidental and tenuous distinction in the physical state of the substances transported.

extraction plant. The extraction process, besides consuming 1,000 Mcf per day of gas as fuel, was expected to remove a total shrinkage volume of 17,000 Mcf per day (of which 5,840 Mcf was helium, 850 Mcf was purge stream, mostly nitrogen, and 10,330 Mcf was heavier hydrocarbons). The Commission required Panhandle to apply for a certificate covering transportation of the 17,000 Mcf per day shrinkage volume. The Eighth Circuit approved this action, concluding (359 F. 2d 675, 683) that:

> * * * [E]ven though a portion of the mainstream is being transported to a non-jurisdictional facility or for a non-jurisdictional sale, the Commission is not prevented from exercising certificate jurisdiction over the transportation of that portion.

Jupiter approaches this case (Br. p. 43) in such a way as to miss its point as applied to the present facts. It argues that since *Panhandle* supports "certificate jurisdiction over helium-bearing gas", and "Jupiter does not contest Commission jurisdiction over condensate-bearing gas, or certificate authority over the combined stream, but it does contest Commission jurisdiction over the rate for transporting the condensate itself", the case does not aid the Commission's position. In fact, Panhandle had attempted to separate, conceptually, the 17,000 Mcf per day from the rest of the stream (as Jupiter is presently attempting to separate the "condensate" portion of its stream) and treat it as non-jurisdictional. Of course, the Commission normally deals with the entire gas stream since no reasons for separating its particular components exists. But if, as here, a transporter claims a right to separate payment for transportation of separate elements of the gas stream, then (assuming there is a contractual basis for the claim) the Commission must exercise jurisdiction over the separate components of the stream.

Indeed, the Commission's examiner in the *Panhandle* case was persuaded by an argument like Jupiter's. He stated that (30 FPC 1260, 1275):

> * * * Moreover, if the shrinkage volumes of gas is understood as containing the helium, nitrogen, and

> liquids, particularly after the extraction, then it follows from what has been already said as to the application of the Helium Act, that the Commission's jurisdiction is open to serious question by reason of the restrictions contained in Section 11 of that Act. [The Helium Act left the Commission with jurisdiction over natural gas containing helium, but denied it jurisdiction over helium itself.] * * * From the circumstances it is plain that the "shrinkage" is not natural gas as generally understood, and it is accordingly concluded that there is no justification for requiring Panhandle to secure a certificate of public convenience and necessity for its transportation.

The Commission concluded that the examiner's rationale was erroneous (30 FPC 1260, 1263), and the court agreed. *Panhandle* makes clear, therefore, that the transportation of a part of the gas stream cannot be removed from Commission jurisdiction simply by showing that it will not be resold to consumers or that after transportation is completed it will emerge as something arguably "not natural gas".

Contrary to Jupiter's contention (Br. pp. 43-44), the Commission's reference to *Louisiana Public Service Commission* v. *F.P.C.*, 359 F. 2d 525 (CA5), certiorari denied, 385 U.S. 833 (1966) was also apt. There the court held that gas sold within the state of production from a commingled stream, the remainder of which was travelling in interstate commerce, was within the Commission's jurisdiction. In this, the court followed *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) and *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965). The basis of these decisions is the fact that a portion of a gas stream remains under Commission jurisdiction even though sold "non-jurisdictionally", when the rest of the stream is moving in interstate commerce. That is the general situation in the present case. The liquids and liquefiables at issue move as part of the full stream transported by Jupiter, which is incontestably moving in interstate

commerce, where it will be resold jurisdictionally. As the Supreme Court observed in *Lo-Vaca* (379 U.S. 366, 369): "The fact that a substantial part of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction." [19]

Jupiter's argument (Br. pp. 39-40) that the Commission's assertion of jurisdiction over the part of the gas stream not sold to Tennessee trenches on the jurisdiction of the Interstate Commerce Commission is nonsense. It is clear that if these components of the stream were separated at the lease and transported by themselves in a separate pipeline, I.C.C. jurisdiction might attach to the operation, but such is not the case here. The primary function of Jupiter's pipeline is the transportation of gas, and liquids are carried only as a by-product and part of a single stream. The cases cited by Jupiter all dealt with situations in which the I.C.C.-regulated pipeline carried only liquid products. Indeed, the Interstate Commerce Commission's jurisdiction does not extend to gas, 49 U.S.C. 1(1)(b), and accordingly does not even reach the gas stream which, as we have seen is in its entirety subject to Power Commission jurisdiction.

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[19] Jupiter argues (Br. pp. 36, 40-42) that the ultimate consumer of natural gas can be protected against excessive costs even if the Commission has no jurisdiction over a rate to be charged for the transportation of condensate. It is true that, as Jupiter points out (Br. p. 36), the Commission in its Notice of Proposed Statement of General Policy in Docket No. R-338, dated February 5, 1968, 33 Fed. Reg. 2860, has indicated the *tentative* view that the consumers in the ordinary case may be adequately protected by allocating out of a purchasing pipeline's jurisdictional gas cost of service the cost of transporting gas removed by producers as liquids. The fact that the Commission may not find it necessary to fix separate rates for such transportation, of course, in no way even suggests that such jurisdiction does not exist. Indeed, the notice clearly indicates that the Commission felt free to require pipelines to file rates for such services. And even if it were assumed that complete protection could be afforded the consumer without rate jurisdiction (an assumption subject to some doubt), no protection could be afforded the party for whom the condensate portion of the gas stream was transported without such jurisdiction. The Act plainly envisions protection of all such parties.

CONCLUSION

For these reasons, the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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February 10, 1969

APPENDIX

The Natural Gas Act, June 1, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w provides in pertinent part:

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in

detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * *

SEC. 16. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find

necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

* * * *

SEC. 20. (a) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this act or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices or concerning apparent violations of the Federal antitrust laws to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings.

(b) Upon application of the Commission the district courts of the United States, the District Court of the United States for the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this act or any rule, regulation, or order of the Commission thereunder.

* * * *

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

Nos. 22154 and 22442

THE JUPITER CORPORATION,
UNION OIL COMPANY OF CALIFORNIA,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

TENNESSEE GAS PIPELINE COMPANY,
A Division of Tenneco Inc., *et al.*
Intervenors.

ON PETITION TO REVIEW ORDERS OF THE
FEDERAL POWER COMMISSION

BRIEF FOR TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., INTERVENOR

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February 10, 1969

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On Petition to Review Orders of the
Federal Power Commission

BRIEF FOR TENNESSEE GAS PIPELINE COMPANY, A DIVISION OF TENNECO INC., INTERVENOR

ISSUES PRESENTED FOR REVIEW

The petitions in Nos. 22154 and 22442 bring to this Court for review the orders issued by the Federal Power Commission (Commission) on April 3, 1968, in Docket No. RI63-212, *et al.* (R. 3728-3739) and its order on rehearing issued May 24, 1968 (R. 3821-3824).[1] These orders are still another phase in the extensive and continuing efforts by

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[1] The petition in No. 22153, which was also consolidated herein, has been dismissed on the motion of the petitioner in that case. The petition in Nos. 22442 was originally filed in the Court of Appeals for the Fifth Circuit; however, by order dated October 21, 1968, the Fifth Circuit transferred the case to this Court.

The Jupiter Corporation (Jupiter) to retain the excessive profits which it had been receiving in connection with its operations in the Rollover Field in offshore Louisiana. As shown below, the Presiding Examiner had found, after full and extensive hearings, that Jupiter was entitled to only .632¢ per Mcf for all services provided by it in the Rollover Field; the Commission had accepted Jupiter's offer of settlement of 1¢ per Mcf, approximately 50 per cent more than the amount found by the Examiner; and yet Jupiter thereafter, on the basis of ingenious and contrived arguments, has sought to revert to the same rates which it had been charging prior to the rate settlement.

The orders here under review deal with two separate phases of these continued efforts by Jupiter. These were brought to the Commission's attention by a petition for declaratory relief filed by Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) (R. 3440-3445) and a similar petition filed jointly by Phillips Petroleum Company and Kerr McGee Corporation (PKM) (R. 3733). In these orders[2] the Commission *inter alia* reaffirmed the rights of the parties previously determined in certain rate settlements with respect to the price to be paid by Tennessee for gas produced by Union Oil Company of California (Union)[3] in the Rollover Field, offshore Vermilion Parish,

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[2] The Commission's orders similarly reaffirmed the previously-determined price to be paid by Jupiter to PKM for gas produced by PKM in the Rollover Field in light of the various services Jupiter allegedly furnishes PKM with respect to the condensates and liquefiable hydrocarbons contained in that gas stream. Although Jupiter in turn resells to Tennessee the gas which it purchased from PKM, there is no dispute over the 19.5-cent per Mcf rate which Jupiter charges Tennessee for this gas.

[3] Successor in interest to Pure Oil Company (Pure). Since such succession occurred as of July 1965 and the period here involved covers times before as well as after that date, the references in the brief will sometimes be to Pure and sometimes to Union. However, in each instance the reference to the same company is intended.

Louisiana, and transported onshore by the Jupiter Corporation (Jupiter).[4] The issues presented for review by this, *i.e.*, the Union, controversy[5] falls into two groups:

> First, Jupiter claims that despite the Commission's acceptance in 1966 of Jupiter's proposed rate settlement, Jupiter may nevertheless charge Union the same average 3.4 cents per Mcf for transporting onshore the Rollover gas and other hydrocarbons[6] in that gas stream and for performing other services with respect to these liquids as it charged for these services prior to that settlement. Stated in another way, the question in the Jupiter phase of the Union controversy is whether under Jupiter's Rate Schedule No. 7 as amended pursuant to Jupiter's 1966 rate settlement, and absent reformation or amendment of the present contractual arrangements, Jupiter may charge, in addition to 1 cent per Mcf for the transportation of gas a separable amount for services provided for the other hydrocarbons in Union's Rollover gas stream.
>
> Second, Union contends that under its FPC Rate Schedule No. 120, its rate to Tennessee for the Rollover

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[4] Jupiter is the successor in interest to Commonwealth Oil Company which, in turn, was the successor in interest to Marine Gathering Company.

[5] As distinguished from the PKM controversy mentioned in footnote 2 above.

[6] *I.e.*, condensates and liquefiable hydrocarbons. Condensates are hydrocarbons, which are in a gaseous state in the high pressure of the underground reservoir and which condense to a liquid with the reduction in the pressure as the stream comes out of the well. Actual separation of these hydrocarbons is usually done mechanically. Liquefiable hydrocarbons, however, typically remain in a gaseous state as part of the gas stream as it comes from the well. They are normally removed from the gas stream by more complicated processing than mere physical separation.

gas includes not only Jupiter's charges for transporting the gas onshore but any additional amounts Jupiter charges for providing services for the other hydrocarbons in the Rollover gas stream even though they are not sold to Tennessee. Specifically, the issue is whether under Union's Rate Schedule No. 120, Tennessee is obligated to reimburse Union only the 1 cent per Mcf which Jupiter is authorized to charge Union for the transportation of gas under its 1966 rate settlement even though Jupiter is claiming a right to make an additional separable charge of 2.4 cents per Mcf of gas for the other hydrocarbon services which it provides Union.[7]

STATEMENT OF THE CASE

Background

As the successor in interest to Pure by merger effective July 16, 1965, Union is engaged, *inter alia,* in the production and sale of natural gas from the Rollover Field which is located in the Gulf of Mexico offshore from Vermilion Parish, Louisiana. Since 1957 this Rollover gas has been sold directly by Pure and Union to Tennessee, a pipeline company selling natural gas for resale in interstate commerce subject to the Commission's jurisdiction under the Natural Gas Act.

When the Rollover gas stream is produced at Union's offshore platform, it is dehydrated and the condensates are separated out for measurement purposes. The condensates are then recombined with the gas and the commingled stream is then turned over to Jupiter for transportation

[7] Union also seeks to have the Court consider its further claim that the Commission erred in failing, prior to issuing the orders here under review, to grant a hearing allegedly requested by Union.

onshore through its 8.44-mile long 8⅝-inch-diameter line, to a point about 1,000 feet inland, where the line connects with two lines owned by Tennessee. These lines of Tennessee carry the gas about 29 miles further inland to Jupiter's separation plant, where the condensates are again separated out, this time by Jupiter, and are delivered into Union's storage tanks. Jupiter then redelivers the gas stream (minus the condensates) to Tennessee at the outlet of the Jupiter separation plant (where title passes to Tennessee), and Tennessee transports it 8½ miles further inland through Tennessee's lines to Phillips' Lake Arthur processing plant, added in 1962, where the liquefiable hydrocarbons are removed and sold as liquids, Tennessee getting no part of the proceeds of these sales (R. 3141-3144).

Jupiter has been furnishing the above services under its contract with Pure dated January 2, 1957 (on file with the Commission as Jupiter's Rate Schedule No. 7). Prior to the 1966 Jupiter rate settlement, that Rate Schedule provided with regard to compensation as follows (R. 1693-1694):

> "Section 7. Compensation. The compensation to be paid by Pure to [Jupiter] for the services of [Jupiter] in gathering the gas and condensate subject to this agreement and separating condensate from the gas at [Jupiter's] plant, and for performing all other services provided for hereunder, exclusive of compression, shall be as follows:
>
> * * *
>
> "(a) For the first 62,500 MCF of gas per day, whether received from dedicated leases in fields now connected to [Jupiter's] gathering system or new fields hereafter connected — four cents (4¢) per MCF.
>
> "(b) For all excess gas received from dedicated leases in fields now connected to [Jupiter's] gathering system — three cents (3¢) per MCF."

The composite rate under this provision averaged approximately 3.4 cents per Mcf of gas.

The Pure Rate Settlement

Prior to the Commission's acceptance of the Pure rate settlement in 1962, Pure's rate to Tennessee for its Rollover gas was in the usual form of a unitary sales price for the gas. However, in the investigation which the Commission instituted into Pure's rates, Pure proposed, as part of an overall rate settlement, that the rate for its sale of the Rollover gas to Tennessee be amended "so as to provide a base price of 16.75¢ per mcf (15.025 psia) plus reimbursement for actual payments by Pure to Jupiter for transportation" (R. 2581, see also R. 2590).

The Commission order, issued November 27, 1962 (R. 2611-2615), accepting Pure's proposed settlement, summarized Pure's proposed two-part rate for the Rollover gas as follows (R. 2613):

> "At the present time, Pure makes the sale from Rollover directly to Tennessee onshore and pays [Jupiter] a transportation fee of 4¢ for the first 62.5 MMcf per day transported and 3¢ on additional volumes. The present rate being charged is 21.3333¢ per Mcf, of which Pure retains 17.9¢ per Mcf. It proposes a settlement rate of 16.75¢ per Mcf, plus reimbursement of the charges Pure has to pay for transportation. Pure has agreed to charge only that amount it actually has to pay for the transportation of the gas onshore, and to make any necessary filing in the future to reflect any change that may be made therein. * * *"

And, in a footnote to the proposed Rollover rate as listed in the Appendix to its order, the Commission, referring to Jupiter's then average charge of 3.4 cents per Mcf, commented (R. 2618, 2621):

"These charges to be recouped from Tennessee as part of the rate will be only those actually paid by Pure to Jupiter, * * * Any reduction in charges by Jupiter will thus reduce payments by Tennessee to Pure."

Thereafter, by letter agreement dated December 18, 1962 (R. 1983-1984),[8] Pure and Tennessee amended the rate for the Rollover gas to a base price of 16.75 cents per Mcf[9] plus:

* * *

"(b) The average payment in cents per MCF paid to [Jupiter] by [Pure] for gas transported, which shall be determined monthly by dividing the total payment made by [Pure] to [Jupiter] by the total gas volume on which such payment is based computed at 15.025 pounds per square inch absolute. In no event will the payment be based upon a price greater than four cents (4¢) per MCF for the first sixty-two thousand, five hundred (62,500) MCF per day and three cents (3¢) per MCF on additional volumes."

Tennessee's payments thereafter and until shortly after the Jupiter rate settlement next discussed, included the average 3.4 cents per Mcf in accordance with paragraph (b) above.

The Jupiter Rate Settlement

Meanwhile, on December 5, 1962, within a week after it accepted the Pure settlement proposal, the Commission instituted an investigation into the gas transportation rates being charged by Jupiter (R. 2626-2628). Following full hearings held after extensive delays, the Examiner, on

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[8] Filed with the Commission as a supplement to Pure's Rate Schedule No. 40, now Union's Rate Schedule No. 120 (R. 1980-1982).

[9] The base price has been increased to 17.75 cents per Mcf, subject to refund effective January 8, 1968 (R. 3730).

January 5, 1966, issued an Initial Decision in which he concluded that the just and reasonable rate for the services furnished by Jupiter was .632 cents per Mcf, based on its cost of service for the test year 1962 (R. 3164, 3188). The cost of service of $334,859 thus found by the Examiner included $19,255 in costs allocable to services other than the transportation of jurisdictional gas (see, *e.g.*, R. 3223, 3229, 3230).

Thereafter, following the filing of the exceptions by various of the parties and the Staff, Jupiter submitted an offer of settlement (R. 3336-3349). Adverting to the comment of the Commission Staff witness that Jupiter performed "many services not subject to Commission jurisdiction under the Natural Gas Act * * * for [which] Jupiter could charge 'anything it pleases,'" Jupiter complained in its proposal that:

> "* * * *The difficulty with such a suggestion is that Jupiter's contracts with such producers do not provide separate charges for jurisdictional and for non-jurisdictional services.* * * * Some method should be found to preserve Jupiter's contractual right to charge for non-jurisdictional services despite adjustments of or reductions in its charges for services deemed to be jurisdictional." (R. 3341)[10]

Because of this all-inclusive character of its rate, Jupiter suggested (R. 3338):

> "* * * that an equitable resolution of this case requires *either* a *reformation* of its various contracts with the Rollover Field producers (Pure, Phillips and Kerr McGee) to require those producers to pay Jupiter, *or* Commission permission for Jupiter to retain, charges for the gathering of natural gas, *and* for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids."

[10] Emphasis supplied throughout unless otherwise indicated.

Jupiter went on to propose as a settlement that "the total contractual charge [for all services provided] * * * shall be 1.75 cents per Mcf (the present total charge is 3.4 cents per Mcf); * * *" with 1.25 cents per Mcf thereof to be "an imputed charge * * * for gathering natural gas delivered to Tennessee at the Jupiter Plant" (R. 3345-3346). Union,[11] along with PKM, vigorously opposed the contract modifications suggested in Jupiter's settlement offer (R. 3357-3358).

Following off-the-record settlement conferences, Jupiter submitted an amended settlement offer (R. 3370-3384). This time Jupiter proposed a "charge [of] 1.0 cents per Mcf (at 15.025 psia) for transporting natural gas for [Union]" (R. 3371). However, it proposed, in addition, expressly to reserve "its rights with respect to the collection from [PKM] and [Union] of compensation for services Jupiter performs for these producers in transporting, separating or storing these producers' condensate and liquefiable hydrocarbons" (R. 3373). In support of this proposal, Jupiter submitted data indicating that the costs allocated for the providing of these claimed additional services aggregated only about $15,000 or roughly 2.5% of a total claimed "gathering" cost of service of $590,000 (R. 3387, 3388).

In accepting Jupiter's proposed rate settlement in its order issued June 28, 1966 (R. 3405-3410), the Commission noted (R. 3407):

> "the proposed settlement would accomplish the following: A reduction in Jupiter's transportation rate of approximately 65 percent which would effect an immediate reduction in Tennessee's purchased gas costs of over $1,000,000 annually without further litigation;

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[11] Union apparently kept in close touch with the proceeding although it scrupulously avoided formal intervention and participation as a party.

> establishment of a firm transportation rate of 1.0¢ per Mcf; immediate settlement of the Louisiana severance tax issue; termination of all pending rate and certificate proceedings and court appeals involving Jupiter; realization of the maximum benefits to consumers through establishment of the lowest transportation rate, at which Jupiter claims its stockholders will be protected from severe financial loss and under which Jupiter can be preserved as an operating entity."

And in response to the producers' reiterated opposition to their paying any additional separable charges for the other hydrocarbon services (R. 3397, 3400, 3402), the Commission stated (R. 3409):

> "Jupiter's reservation of claimed rights with respect to the collection from Union and [PKM] of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons and the producers' answers on that point does not present any issue to be determined at this time. *Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission.*"

Thereafter PKM filed an application for rehearing (R. 3411-3425) in which it urged, *inter alia,* that the italicized sentence in the above quotation:

> "* * * is so worded as to seem to imply something that could not have been contemplated: that there remains open for negotiation between the parties some new contractual 'arrangements' respecting Jupiter's 'services' in its handling of the condensates for Phillips-Kerr McGee. If that is implied, the Commission, it is submitted, has plainly erred. There is already a firm contractual arrangement covering the matter — that entered into between Phillips-KerrMcGee and Jupiter's predecessor, assumed by Jupiter, and still in force" (R. 3418).

Clarifying the statement thus questioned, the Commission, by order issued August 22, 1966 (R. 3430-3431), explained as follows (R. 3430):

> "The quoted sentence neither implies that further contractual arrangements are open for renegotiation nor requires that further negotiations be held. That sentence merely indicates that we are not now determining the claimed rights of any party on this matter."

The Orders Under Review

Although Jupiter filed changes in its FPC Rate Schedule No. 7 in conformity with the settlement order (R. 3732), Jupiter nevertheless continued, with Union's acquiescence, to bill Union an average total of 3.4 cents per Mcf for the services provided by it for Union's Rollover gas stream (R. 3471-3472, 3478-3486), on the claimed basis that the 1.0 cent per Mcf provided in the settlement was for the transportation of gas and this left the remaining 2.4 cents per Mcf available for charging for the other hydrocarbon services. For its part, Union sought to pass on to Tennessee this average 3.4 cents per Mcf rate in addition to the base price for gas sold to Tennessee, stating as the reason therefor in its invoice, "Transportation charge shown above represents actual rate paid to Jupiter for gas delivered during the month involved" (see R. 3444, 3447).

Adverting to the above facts, Tennessee, on June 1, 1967, filed a petition for a declaratory order as to the proper rate to be charged it under the Jupiter and Union rate settlements (R. 3440-3445).[12] In addition to filing a response to Tennessee's petition, Jupiter filed a complaint against Union in the United States District Court for the Northern District of Illinois, Eastern Division (No. 67-

[12] On August 30, 1967, PKM similarly filed a petition for a declaratory order (R. 3544-3548).

C1398), seeking a declaration that, despite its 1966 rate settlement, it was entitled to charge Union an average rate of 3.4-cent per Mcf of gas for services provided under its contract with Union (R. 3613-3617).[13] Union filed a third party complaint, impleading Tennessee as a third party defendant and claiming the right to reimbursement from Tennessee of all the payments which it made to Jupiter in connection with the Rollover gas stream (R. 3619-3625). Thereafter, Union and Tennessee moved to stay the District Court proceedings on the ground that primary jurisdiction was in the Federal Power Commission (R. 3627-3636). By order issued January 31, 1968, the District Court granted the stay (R. 3734).[14]

Subsequently, on April 3, 1968, the Commission issued its order here under review (R. 3728-3739). After summarizing the foregoing facts, the Commission held that "the presently authorized rate for the transportation service Jupiter performs" for Union is 1.0 cent per Mcf (R. 3736). And while it declined to inject itself in the issues sought to be raised in the pending court litigation, the Commission went on to observe that (R. 3738):

> "* * * in the present situation any judicial remedy available * * * may well be a matter of equity rather than of law."

Further, it commented that it had jurisdiction over the portion of the gas stream not sold to Tennesee

> "* * * even though it may consist of condensates and heavier hydrocarbons subsequently extracted and sold non-jurisdictionally as liquids. * * * This means that even *if it* were determined that Jupiter was contract-

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[13] Jupiter also filed a comparable action against PKM in the Circuit Court of Cook County, Illinois (see R. 3733).

[14] On January 12, 1968, the Circuit Court for Cook County, Illinois, denied the stay there requested (see R. 3734, fn. 6).

> ually entitled to reimbursement for the transportation services it provides * * *, it *would not* be entitled to payment therefor unless and until it secures a certificate for such transportation at an appropriate rate * * *" (R. 3735).

As to Union's claim of a right to reimbursement of all payments made to Jupiter in connection with the Rollover gas stream, the Commission held (R. 3738):

> "* * * It would be a most peculiar sales arrangement under which Tennessee would agree to pay a producer for the costs of transporting onshore that part of the gas stream which Tennessee does not receive, but which is, instead, returned by transporter to the producer. No such obligation can be spelled out, or even implied, from the orders or underlying contracts in issue here."

Accordingly, the Commission concluded by expressly finding (R. 3738-3739):

> "(A) Union is, and since May 15, 1966, has been, obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's FPC Gas Rate Schedule No. 7.
>
> "(B) Union is, and since May 15, 1966, has been, authorized to charge Tennessee no more than 1.0¢ per Mcf over and above its base rate under Union's FPC Gas Rate Schedule No. 120."

ARGUMENT

The Commission's conclusion in its April 3, 1968, order here under review that Union is to charge Tennessee only 1 cent per Mcf of gas in addition to the base price, is founded upon two major rulings. One is that under Jupiter's FPC Rate Schedule No. 7, and in the absence of any contract reformation, Jupiter may not charge Union anything in addition to the 1 cent per Mcf of gas as set out in Jupiter's 1966 rate settlement for the other hydrocarbon services provided; such is the effect of the Commission's Finding

(A) *supra.* The second is that under Union's FPC Rate Schedule No. 120, Union is entitled to reimbursement from Tennessee only for the payments made by Union to Jupiter for the transportation onshore of Union's Rollover gas; such is the effect of the Commission's Finding (B), *supra.*

Jupiter and Union each addresses its respective brief to only that portion of these Commission rulings which has a direct adverse impact upon it. Each claims that the Commission misconstrued its particular Rate Schedule here involved and that it has greater rights under its Rate Schedule than was held by the Commission.[15] Although the Commission's ultimate conclusion must be affirmed if either of these Commission rulings is sustained,[16] we show below that each of these rulings is in fact eminently sound and free from error. Accordingly, the portion of the Commission's order of April 3 dealing with the Union controversy must be affirmed.

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[15] Significantly, Union has not intervened in the proceeding instituted by Jupiter nor has it taken a position *vis-a-vis* the Commission's construction of Jupiter's Rate Schedule — even though affirmance of that construction would, as a practical matter, nullify any adverse effect which the Commission's construction of Union's Rate Schedule might otherwise have upon Union.

[16] Should the Court reject the Commission's construction of the Union Rate Schedule, the amount charged by Jupiter to Union would be directly reflected in what Tennessee pays Union. In those circumstances, Jupiter's claims (Br., pp. 1-2), that "the first and most important fact in these proceedings is that * * * the result of these proceedings will have no effect upon the public" and that "the orders of the Commission here under review merely affect the distribution of revenues between [Jupiter] and two large producers of natural gas," are patently unfounded as applied to the Union controversy. Also, since Jupiter's further argument (Br., pp 2, 47-49) that "the normal judicial deference to Commission findings is not applicable here" is also based on the above claims, this further argument falls of its own weight.

I.

JUPITER'S RATE SCHEDULE NO. 7, AS AMENDED PURSUANT TO ITS RATE SETTLEMENT, DOES NOT PROVIDE FOR ANY CHARGES IN ADDITION TO THE ONE CENT PER MCF OF GAS THERE SET OUT FOR THE OTHER HYDROCARBON SERVICES ALLEGEDLY FURNISHED UNION

A. Most of Jupiter's Arguments Have No Bearing Upon the Union Controversy

Although Jupiter has formulated the arguments in its brief in terms of its controversy with PKM, Jupiter obviously intends such arguments to be read as addressed to the Union controversy as well. One would normally expect Jupiter to have presented its case primarily in terms of the Union controversy since the Union portion of Jupiter's Rollover operation represents roughly 61% of the total Rollover stream as compared to the 39% portion for PKM, and Jupiter claims 2.4 cents per Mcf of gas for the additional services allegedly provided Union as compared to the 1.4 cents per Mcf of gas claimed for the claimed PKM additional services (see R. 1234-1236).

Without indulging in any speculation as to why Jupiter chose to focus upon the controversy in which its stake is substantially smaller, it is important to note at the outset that without regard to their validity *vel non* as applied to the PKM controversy, several of the arguments advanced by Jupiter palpably have no relevance to the Union situation. These include:

1. The references to the action in the Circuit Court of Cook County, Illinois, instituted by Jupiter (Jupiter Br., pp. 17-21; see also pp. 2, 3). As noted earlier herein, the United States District Court for the Northern District of

Illinois, Eastern Division, in which Jupiter instituted a similar suit against Union, has, in contrast to the state court, recognized the primary jurisdiction of the Federal Power Commission and has suspended all proceedings in that litigation pending final Commission action. Moreover, no question is raised or involved in the Federal court action with regard to the disposition, *pendente lite,* of the monies purportedly in dispute.

2. The claim, based on *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332 (1956) and the "filed rate" doctrine, that PKM may not charge Jupiter more than allowed by its contract with Jupiter (Jupiter Br., pp. 21-24, see also pp. 2-3). In contrast to the PKM situation where there are cross charges, PKM against Jupiter for gas sold and Jupiter against PKM for services provided, Union makes no sales to Jupiter and Jupiter's charges for services provided are billed directly to Union without recourse to any offset technique. Thus, the very format of the Jupiter-Union transaction precludes any argument that the Commission's action herein has the effect of requiring Union to increase its price to Jupiter.

3. The various arguments (Jupiter Br., pp. 12-13, 24-28, 46-47) as to the claimed invalidity of the actions taken by the Commission in its order of December 13, 1968. The December 13 order was issued to deal wth a special problem in the PKM controversy, which had its genesis in the fact that under the contractual arrangements there involved, Jupiter was in a position to exert self-help, in the form of offsets, in collecting amounts claimed for the other hydrocarbon services. Accordingly, Jupiter's attack upon the action of the Commission patently has no applicability to the Union controversy.

B. Jupiter Misreads the Commission's April 3 Order

With the elimination of the above arguments, only two of the contentions made by Jupiter bear upon the Union controversy. One of these relates to the meaning of the April 3 order. Jupiter makes no argument *per se* in this regard and instead adopts the tact of presenting its preferred reading in factual context as if uniformly accepted and beyond dispute (see Jupiter Br., pp. 12-17, see also 3, 8-9, 11). Thus, Jupiter takes the position that the Commission's April 3 order (1) recognizes a right in Jupiter, under its Rate Schedule No. 7, to make a separate charge for the other hydrocarbon services in addition to the one cent per Mcf charged for the transportation of gas; and (2) rules that the existence of such a right and the amount to be charged are matters of contract interpretation properly for the court, rather than the Commission. Accordingly, Jupiter asserts that the Commission's conclusion in that order that "Union is * * * obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's Gas Rate Schedule No. 7" (R. 3738) was merely intended to "designate" for the transportation of gas one cent of the average 3.4 cents per Mcf which Jupiter charged for all services (see, *e.g.*, Jupiter Br., p. 14, 2nd fn).

Far from being beyond dispute, Jupiter's reading of the April 3 order is demonstrably in error. As shown below, the Commission, in accepting the Jupiter settlement, has not recognized any right in Jupiter to charge Union a separable additional amount for the other hydrocarbon services. To the contrary, Jupiter's attempt at this time to charge Union 2.4 cents per Mcf of gas for these additional services amounts to a unilateral abrogation by Jupiter of the settlement which was accepted by Commission order

of June 28, 1966, and which became binding upon Jupiter when it failed to seek rehearing or court review.[17]

1. The 1966 Rate Settlement Did Not Provide Jupiter With a Right to Charge Separable Additional Compensation for Other Hydrocarbon Services

(a) Prior to the 1966 Rate Settlement, Jupiter's Rate Schedule Contained No Provision for Separable Additional Charges for Other Hydrocarbon Services

Prior to the Commission's acceptance of Jupiter's proposed rate settlement in 1966, Jupiter's Rate Schedule contained no provision under which Jupiter could make a separable additional charge for other hydrocarbon services. Section 7 of that Rate Schedule, which sets out the 3.4-cent per Mcf average rate then in effect, flatly states that the rate there provided was to be:

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[17] Jupiter's other remaining contention is that the Commission erred in stating (R. 3735) that Jupiter would have to obtain both certificate and rate approval from the Commission before it could collect any additional compensation for transporting other hydrocarbons to which a court might find it entitled. Although Jupiter devotes a substantial portion of its brief (pp. 28-46) to this argument, no such question is in fact presented in this case. The Commission's statement is pure dictum with regard to the April 3 order; it is neither germane to, nor is it a part of, the reasoning leading to the Commission's conclusion as to the amount that Jupiter is curently authorized to charge Union. Moreover, there is no undertaking by the Commission to exercise the jurisdiction which it asserts in the order under review. Rather, the Commission expressly recognized the contingent nature of its statement by indicating that the only occasion for exerting the asserted jurisdiction would be "*if* it were to be determined that Jupiter was contractually entitled to compensation" for transporting the other hydrocarbons (R. 3735). Since no court has as yet made any such determination, not only does the Commission's statement have no present impact, but it would be time enough to consider its validity should a court determine that Jupiter is contractually so entitled.

"* * * compensation to be paid by [Pure] to [Jupiter] for the services of [Jupiter] in gathering the gas and condensate subject to this agreement and separating condensate from the gas at [Jupiter's] plant, and for performing all other services provided for hereunder exclusive of compression, * * *." (R. 1693-1694)[18]

Moreover, Jupiter itself expressly so recognized in its offer of settlement. Indeed, as already noted earlier herein, it specifically referred to the unitary all-inclusive nature of its rate as barring the way to its charging "anything it pleases" with regard to the other hydrocarbon services. Thus, Jupiter itself pointed out (R. 3341):

"The difficulty with such a suggestion [*i.e.*, that it could charge anything it pleases for the other hydrocarbon services] is that Jupiter's contracts with [the] producers do not provide separate charges for jurisdictional and for non-jurisdictional services. * * *"

In the same vein, Jupiter suggested that to achieve what in its view would be an equitable resolution of this case, there would be required:

"* * * *either* a reformation of its various contracts with the Rollover Field producers (Pure, Phillips and Kerr-McGee) to require those producers to pay Jupiter *or* Commission permission for Jupiter to retain, charges for the gathering of natural gas and for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids" (R. 3338).

And, in accordance with these acknowledged limitations in its existing Rate Schedule, the rate which it proposed in its offer of settlement was a single rate of 1.75 cents per Mcf for all services, with 1.25 cents thereof "imputed * * * for gathering natural gas delivered to Tennessee at the

[18] Section 5 of the Rate Schedule provides a separate rate for compression in the event compressors are installed (R. 1690-1691). There is no question here with regard to this provision.

Jupiter Plant" (R. 3345-3346). Further, after this offer encountered vehement objections from various parties, including PKM and "non-party" Union, Jupiter itself tendered a new offer of settlement which abandoned the imputed rate concept, offered a 1.0¢ per Mcf rate,[19] and sought to "reserve" the right to claim additional compensation from the producers. (R. 3370-3384).

The absence from Jupiter's Rate Schedule prior to the 1966 rate settlement of any separable additional charge for providing other hydrocarbon services accords with the common practice in the natural gas industry, as the Commission recognized in its Notice of Proposed Statement of General Policy issued February 5, 1968, in Docket No. R-338[20]. See also, *e.g., Continental Oil Co.,* 27 F.P.C. 96 1962); *Michigan Wisconsin Pipe Line Co.,* 29 F.P.C. 989 (1958); *Texaco Inc.,* 33 F.P.C. 1228 (1965).

In this regard, it should be noted that it is immaterial as a practical matter whether the rate set out in Jupiter's Rate Schedule No. 7 be regarded as a unitary rate for all services or a rate only for the transportation of gas with the other services being provided free. For in truth and in fact, the other services are insignificant as compared

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[19] This 1.0¢ rate to be compared with the Examiner's finding that Jupiter's *total* cost of service (including *profits*) for rendering *all* services was only .632 per Mcf.

[20] Jupiter's attempt to derive comfort from this Proposed Statement by claiming (Br. p. 36), that the Commission's decision in this case "is inconsistent with its own policy" as reflected in the Commission's "Proposed Statement of General Policy" in Docket No. R-338, goes too far. As the excerpt quoted by Jupiter makes clear, the views there set out by the Commission are "tentative" only. As a matter of fact they have been hotly contested by various interested parties. Furthermore, the Commission has taken no further action in that proceeding and hence has obviously not formulated any firm policy in the matter.

to the transportation of gas and have consistently been so treated. They have been in effect ignored until Jupiter recently latched on to them as a basis for making its present claims for additional compensation. For, as the Commission found (R. 3822):

> "* * * the major function which Jupiter was to perform under the contracts was the transportation of the gas from the offshore platforms * * * and * * * the vast bulk (if not all) of the rates [charged by Jupiter] was intended to serve as recompense for that service."

The validity of this finding is easily demonstrated.

First, contrary to Jupiter's implication, Jupiter does not provide Union any hydrocarbon *storage* services. As to the storage of condensates, Jupiter's only responsibilities under its Rate Schedule No. 7 are (1) to deliver the condensates "at the tank of [Union]" (R. 1692); and (2) to furnish "free of cost to [Union] * * * a location upon which [Union] may erect and maintain storage facilities * * *" (R. 1697); the actual storage facilities are "furnished by [Union] at [Union's] expense" (R. 1696). As for the liquefiable hydrocarbons, they become available for storage only after processing in the Phillips plant, which is well beyond any point that Jupiter has had anything to do with the Rollover gas stream.

Second, Union, rather than Jupiter, does the separating at the offshore platforms, as is apparent from the explicit provision in Section 11 of the Jupiter Rate Schedule that "[Union] shall separate the gas and condensate and free water and, after recombining the gas and condensate deliver the same to the [Jupiter] gathering system at the [Union] delivery points" (R. 1696-1697). And while Jupiter does do the onshore separating which incidentally admittedly consists of merely a mechanical processing with no ex-

traction of the liquefiable hydrocarbons involved (R. 648), Section 11 of the Jupiter Rate Schedule contains the following significant language (R. 1697-1698):

> "[Jupiter] agrees to erect, install, maintain and operate at [Jupiter's] sole cost, risk and expense, in connection with its gathering system, a plant to mechanically separate the condensate from the gas delivered hereunder, and [Jupiter] will redeliver to [Union], free of cost and expense to [Union] * * * all of the condensate so recovered."

As summarized by Union (Br., p. 23):

> "Nontransportation services involve mere mechanical separation which is very inexpensive and similarly inexpensive storage of condensate in tanks owned by Union on land in a swamp owned by Jupiter."

Third, the record shows that the condensates which Jupiter actually separated from the Rollover gas stream in 1962 (converted to a Mcf basis) aggregated some 275 *thousand* Mcf for both PKM and Union,[21] or about one half of one percent of the total volume of Rollover stream of nearly 53 *million* Mcf in that year. In addition, while there is no separate figure in the record as to the volumes of liquefiable hydrocarbons involved in that year, the Union gas delivered to Phillips for processing and not redelivered to Tennessee aggregated about 1,620 thousand Mcf — a volume which includes the gas used by Phillips as plant fuel as well as the "shrinkage" of the gas stream resulting from the extraction of liquefiable hydrocarbons. Even assuming, *arguendo,* that that figure includes only liquefiable hydrocarbons, Union's total other hydrocarbons in 1962 would still amount to only about 5 percent of Union's total volume of about 32.5 million Mcf for that year. (see R. 1236, 3388).

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[21] Based on the 61-39 division of the gas stream, Union's share of the condensates in 1962 amounted to about 165 thousand Mcf.

Finally, the costs of Jupiter's Rollover system allocated to the other hydrocarbon services buttons the matter up. The evidence submitted by the Commission Staff in the Jupiter rate investigation allocated only about $16,000 of a total cost of service of about $275,000 to the other hydrocarbons (R. 1236). The data submitted by Jupiter in support of its amended offer of settlement in that rate investigation allocated even less, both absolutely and percentage-wise, to these other services; of the total "gathering" cost of service of about $590,000 there claimed, Jupiter allocated some $575,000 to the transportation of gas, leaving only about $15,000 for the other hydrocarbons (see R. 3387, 3388).

(b) The 1966 Rate Settlement Did Not Enlarge Jupiter's Contract Rights

Contrary to Jupiter's assertion (Br., p. 14, 2nd fn.), the effect of the 1966 rate settlement was not to fix a one-cent rate for only the transportation of gas and leave Jupiter free to charge the difference between the old rate and the new one-cent gas transportation rate for the remainder of the services provided by it; rather, that settlement operated to reduce the entire all-inclusive rate charged by Jupiter from 3.4 cent (average) to one cent per Mcf, without creating a right in Jupiter to make a separable additional charge for the other hydrocarbon services provided.

As indicated earlier herein, Jupiter recognized in its original settlement offer that before it would be able to make a separable additional charge for the other hydrocarbon services, *either* a "reformation" of the producers' contracts *or* "Commission permission" would be required (R. 3338). And apparently, in light of the vigorous objections by the producers to any contract reformation, Jupiter, in its amended offer of settlement, made no mention

of contract reformation. Instead, it sought to invoke "the Commission permission" route as a means of achieving its objective. Thus, in addition to a 1-cent per Mcf charge for transporting natural gas, Jupiter proposed in its amended settlement offer that it be permitted to reserve "its rights" to collect a separate additional charge for the other hydrocarbon services (R. 3373). The Hearing Examiner, after full hearings, had of course *found* that Jupiter's *total* cost of service (including *profit*) for *all* services rendered was .632 cents per Mcf.

The Commission, however, did not accept Jupiter's proposal in this respect. Not only did it decline to grant such permission to Jupiter, but it clearly indicated that, as far as it was concerned, any change in Jupiter's existing rights would have to be brought about through new arrangements with the producers. Thus, in its June 28, 1966, order accepting Jupiter's proposed rate settlement (R. 3405-3410), the Commission stated (R. 3409):

> "Jupiter's reservation of claimed rights with respect to the collection from Union and Phillips-Kerr McGee of compensation for transporting, separating or storing those producers' condensates and liquefiable hydrocarbons and the producers' answers on that point does not present any issue to be determined at this time. *Any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission."*

That the Commission's acceptance of the rate settlement was not intended to bestow any new rights upon Jupiter is indicated by the Commission's response to PKM's application for rehearing in this regard. As mentioned earlier herein, PKM there urged that the sentence emphasized in the above quotation:

> "* * * is so worded as to seem to imply something that could not have been contemplated: that there remains open for negotiation between the parties some new contractual 'arrangements' respecting Jupiter's 'services' in its handling of the condensates for Phillips-Kerr McGee. If that is implied, the Commission, it is submitted, has plainly erred. There is already a firm contractual arrangement covering the matter — that entered into between Phillips-KerrMcGee and Jupiter's predecessor, assumed by Jupiter, and still in force." (R. 3418)

To remove the implication envisioned by PKM, the Commission stated by way of clarification (R. 3430):

> "The quoted sentence neither implies that further contractual arrangements are open for negotiation nor requires that further negotiations be held. That sentence merely indicates that we are not now determining the claimed rights of any party on this matter."

Clearly, therefore, the Commission's order accepting Jupiter's amended settlement offer did not undertake to modify the existing arrangements between Jupiter and Union, except in one respect. And that respect was to provide a 1-cent per Mcf rate in lieu of the existing contract average charge of 3.4 cents per Mcf. Accordingly, since, as shown above, prior to its 1966 rate settlement, Jupiter's only charge to Union was 3.4 cents per Mcf with no separate additional charge for the other hydrocarbon services, the Commission's acceptance of Jupiter's settlement offer was not intended to enlarge Jupiter's rights *vis-a-vis* Union. *A fortiori,* it was not intended, as Jupiter argues, merely to "designate" 1 cent of the previous 3.4-cent rate as being the charge for the transportation of gas; and thereby leave Jupiter free to charge "anything it pleases" for the other hydrocarbon services.

(c) The April 3 Order Here Under Review Does Not Enhance Jupiter's Right

The Commission's April 3 order here under review plainly was not intended to create in Jupiter any rights it previously did not have. This is particularly true since the Commission was merely declaring, not finding, the rights of the parties under rate settlements approved earlier by it. Read in light of this purpose, the conclusion is inescapable, we submit, that there is no holding by the Commission of any right in Jupiter at this time to make a separable additional charge for the other hydrocarbon services provided.

Thus, the Commission flatly and without qualification finds and concludes that (R. 3738):

> "(A) Union is, and since May 15, 1966, has been, obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's FPC Rate Schedule No. 7."

As just shown, prior the 1966 settlement, Jupiter did not have any right to make a separable additional charge for the other hydrocarbon services and that settlement did not operate to create any such right in Jupiter. In these circumstances, the above finding declaring Jupiter's rights *vis-a-vis* Union as of the effective date of that settlement patently negates any present right in Jupiter to make any such separable additional charge. This becomes even clearer in light of the Commission's further comment in its order of May 24, 1968, on rehearing that (R. 3822):

> "* * * the major function which Jupiter was to perform under the contracts was the transportation of gas from the offshore platform * * * and * * * the bulk (if not all) of the rates [charged by Jupiter] was intended to serve as recompense for that service."

Moreover, the Commission's expressed deference to the courts with respect to the contractual issues being raised

in the pending litigation must be read in light of its observation in this regard that "* * * in the present situation, any judicial remedy available to Jupiter may well be a matter of equity rather than of law" (R. 3735). In so observing, the Commission plainly was harkening back to Jupiter's earlier recognition (1) that its contracts with the producers did not provide for separable additional compensation for the other hydrocarbon services; and (2) that one of the two avenues for making a separable additional charge for the other hydrocarbon services was through reformation of its contracts with the producers.

That the Commission's approach was *not* that Jupiter *now has* rights to charge separately for the other hydrocarbon services but rather that the pending litigation may result in creating such rights in Jupiter is also indicated by the Commission's further comment that "even if it were to be determined that Jupiter was contractually entitled to reimbursement for the transportation services it provides for [PKM and Union], it would not be entitled to payment therefor * * *" (R. 3735). The basic premise underlying this comment again is that any judicial determination which might be made in the pending litigation would apply *in futuro* only, and not affect the present situation. This again belies the existence now — prior to any determination by the courts — of a right in Jupiter to make a separable additional charge for the other hydrocarbon services.

The foregoing reading of the Commissions April 3 order is buttressed by the Commission's December 13, 1968, order. The Commission there summarized its holdings in the earlier April 3 order[22] as follows:

[22] This summary of the April 3 order is cast in terms of Jupiter's relations with PKM because the December 13 order deals only with the PKM controversy. However, in view of the identical treatment which the Commission has given this aspect of both controversies, the summary applies with equal force to the Union controversy as well.

"* * * We held that some of the functions which Jupiter asserted to be non-jurisdictional were in fact within the jurisdiction of this Commission, and that the remaining services appeared to be quite minor. We noted that Jupiter could not, under the Natural Gas Act, collect any fees from Phillips-Kerr-McGee for the jurisdictional transportation services until it secured a certificate for those services at an appropriate rate. *And we noted that, if Jupiter were entitled to reformation of its contract with Phillips-Kerr-McGee in order to establish some payment for the remaining minor non-jurisdictional services it performed for Phillips-Kerr-McGee, that reformation would have to be done in a court of equity, outside the scope of the contract on file with us as a rate schedule."* (*mimeo,* p. 3)

2. Jupiter's Attempt to Charge Union 2.4 Cents per Mcf of Gas for the Other Hydrocarbon Services Provided Might Frustrate the 1966 Rate Settlement

In its amended offer of settlement, Jupiter represented (R. 3383):

"A resolution of the instant proceedings on the basis of the Amended Settlement Offer made herein will serve to resolve all controversial issues and will put an end to uncertainty respecting Tennessee's cost of gas purchased in the Rollover Field. The settlement rate proposed herein would represent a reduction in Tennessee's cost of purchased gas of over $1,000,000 per year."

The Commission accepted these representations at face value; in approving the settlement offer, it expressly listed as among the reasons for its action that (R. 3407):

"The proposed settlement would accomplish the following: A reduction in Jupiter's transportation rate of approximately 65 percent which would effect an immediate reduction in Tennessee's purchased gas costs

of over $1,000,000 annually without further litigation, establishment of a firm transportation rate of 1.0¢ per Mcf * * *."

However, despite these representations and the Commission's reliance thereon, Jupiter has continued to bill Union[23] the same aggregate rate as it charged Union prior to the settlement, *i.e.*, an average of 3.4 cents per Mcf of gas. The only difference between Jupiter's rate prior to the 1966 settlement and its rate since then is that in contrast to the prior-settlement 3.4 cent rate which was an all-inclusive unallocated rate for all services, the post-settlement 3.4-cent rate purports to be an *aggregate* of two separate charges (1) 1 cent per Mcf *of gas* for the transportation of gas; and (2) 2.4 cents per Mcf *of gas* for the other hydrocarbon services provided.

In this connection, it should be noted that the joint Jupiter-Union actions would have the effect of wiping out the rate reduction which the Commission was led to believe would result from its acceptance of Jupiter's proposed settlement. In addition to Jupiter's claim of the right to make the same aggregate charge as it did prior to its rate settlement, Union is asserting, as already mentioned earlier herein, that its Rate Schedule No. 120, provides for reimbursement from Tennessee of all payments which it makes to Jupiter for services in connection with its Rollover gas stream. In these circumstances, the rate reduction which the Commission expected from the Jupiter settlement could be attained only by rejecting Union's claim — as the Commission properly did (see Point II, *infra*) — of being only a conduit between Jupiter and Tennessee with respect to the charges which Jupiter is seeking to assess against Union.

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[23] After an initial billing attempt which was rejected by Union, see discussion below.

Indeed, the very form of post-settlement billing adopted by Jupiter, at the urging of Union, was designed to facilitate the nullification of the rate reduction. Thus, Jupiter's first post-settlement billing (*i.e.*, for October 1966), consisted of an invoice for $28,902.20 for the transportation of gas computed at the rate of 1.0 cent per Mcf of gas and the reservation of a right to bill Union separately for the other hydrocarbon services furnished (see R. 3460-3461). However, when Union rejected the invoice in that form on the ground that it was based on a "compensation rate not provided for in our agreement * * *" (R. 3641, 3481), Jupiter submitted *two separate* invoices, one, again, for $28,902.20 for the transportation of gas, and the other, in the amount of $66,472.20 for "all other services provided for under our agreement" (R. 3461, 3478-3479). With these two invoices Jupiter sent a covering letter containing the following explanation (R. 3461, 3480):

> "In accordance with your request, we are submitting two invoices. The first covers the transportation of gas and pursuant to our FPC Gas Rate Schedule No. 7, Supplement No. 5, the amount invoiced on this item is calculated on the basis of $0.01 per MCF of gas transported at 15.024 PSIA.
>
> "The second covers all other services provided for in our Agreement except transportation of gas and compression. This second invoice is calculated on the basis of the difference between (a) $0.01 per MCF of gas transported and (b) the rates of compensation set forth in Section 7 of our Agreement covering all services to be rendered by us under said Agreement, including the transportation of gas."

Union then rejected Jupiter's two-invoice billing on the ground, *inter alia,* that its agreement with Jupiter provided a "single rate" of compensation (R. 3461-3462, 3483-3484). Union further commented (R. 3461-3462, 3483):

"It was not our intent nor the purpose of our recent letter to solicit from Jupiter the two in lieu invoices, in each of which you have used 'rates of compensation' not provided for in our agreement."

Thereafter, Jupiter submitted a single invoice in a total amount of $97,384.20, computed "per contract dated January 2, 1957, between corporate predecessors of Jupiter and Union" (R. 3486-3488, 3472). Although the amount thus billed was the same as the total of the two separate invoices rejected earlier, Union not only paid the invoice so computed by Jupiter but asserted then as now a right to reimbursement of this full amount from Tennessee (R. 3462, 3447). See, *infra,* p. 32 *et seq.*

The incongruity of these actions is even more striking in view of the fact that although the other services furnished by Jupiter relate to *other hydrocarbons,* Jupiter arrives at the total billing therefor by multiplying its purportedly separate 2.4 cent charge for providing such services by the *Mcfs of gas transported.* As mentioned earlier herein, the maximum volume of other hydrocarbons handled for Union in 1962 was about 1,780 *thousand* Mcf[24] (on a converted basis) as compared to its some 32.5 *million* Mcf of gas for that year. Assuming for present purposes, that the other hydrocarbons handled in 1962 did not include any plant fuel but included only condensates and liquefiable hydrocarbons, a 2.4 cent per *Mcf of hydrocarbons* rate would yield revenues of about $42,720, as compared to Jupiter's own cost allocation of only $15,000 for these services.

However, by applying the 2.4 cent charge to *Mcfs of gas,* Jupiter would increase its total charge for the other

[24] 165 thousand Mcf of condensates and 1,618 thousand of plant fuel and shrinkage volumes. See *supra* p. 22.

hydrocarbon services to roughly $780,000, based on 1962 figures or nearly 44 cents per Mcf of other hydrocarbons handled in that year — still assuming that plant fuel gas is not included in these hydrocarbon volumes. Since the above figures do include plant fuel, Jupiter's method of computing its charge would obviously result in a charge for the hydrocarbon services of much more than 44 cents per *Mcf of hydrocarbons.*

In view of the foregoing it is clear that under Jupiter's Rate Schedule No. 7, as amended by the 1966 Jupiter rate settlement, and in the absence of any contract reformation or amendment, Jupiter may not charge more than one cent per Mcf of gas for the services furnished by it with respect to Union's Rollover gas stream. Accordingly, the Commission's holding with respect to the Jupiter-Union phase of the Union controversy should be affirmed.

II.

THE COMMISSION'S HOLDING THAT UNION MAY RECOVER ONLY ONE CENT PER MCF OF GAS FROM TENNESSEE IN CONNECTION WITH THE SERVICES FURNISHED BY JUPITER IS FREE OF ERROR

As indicated earlier herein, Union's brief is concerned exclusively with the Commission rulings relative to the Union-Tennessee phase of the Union controversy. Union's efforts to upset these Commission rulings are focussed primarily on the claim, as already mentioned earlier herein, that the Commission committed substantive error in holding that Union's right to reimbursement from Tennessee for services furnished by Jupiter was limited to only one cent per cent per Mcf of gas (Br., pp. 13-29). According to Union, under its Rate Schedule No. 120, Union is merely a conduit between Jupiter and Tennessee with respect to

the charges made by Jupiter for services furnished for Union's Rollover gas stream and hence, Union is entitled to reimbursement from Tennessee for the full amount of these charges by Jupiter even though they include separable, additional amounts for services relative to other hydrocarbons not sold to Tennessee. In addition, Union (Br., pp. 29-32) seeks to raise a procedural question, based on the claim that the Commission had failed to hold hearings as requested by Union prior to the issuance of the orders here under review. As shown below, neither of these contentions has any merit and does not warrant the relief sought by Union.

A. The Commission Properly Held that Union's Right of Reimbursement from Tennessee Is Limited to One Cent per Mcf

In Point I, *supra*, it is demonstrated that under the 1966 Jupiter rate settlement, and absent reformation or modification of the present Jupiter-Union contract, Jupiter is not authorized to make any separable additional charges for the *other hydrocarbon* services furnished by it in connection with Union's Rollover gas stream. We show below that even if the Court were to rule to the contrary and hold that even without a contract reformation, Jupiter may make such a separable additional charge, the amount of the Jupiter charges which Union may pass on to Tennessee is nevertheless limited to the one cent per Mcf provided in the 1966 Jupiter rate settlement.

1. The Documents Cited By Union Support, Rather Than Undercut, the Commission's Ruling

In claiming a right against Tennessee to reimbursement of any separable additional amounts which Jupiter may charge for other hydrocarbon services, Union (Br., pp. 13-

22) relies heavily upon (1) the Pure settlement proposals, (2) the Commission order approving the Pure settlement, and (3) the Pure-Tennessee contract amendment. These documents, however, fall far short of establishing Union's claim. Indeed, since, as Union implicitly concedes (Br., pp. 22-23), these documents provide only for a pass through of Jupiter's charges for "transportation," they support, rather than undercut, the Commission's holdings.

(a) The Pure Settlement Proposals

Despite Union's efforts to "bluff it through," the excerpts from the Pure settlement proposals reproduced in Union's brief, including particularly the italicized portions thereof (see Union's Br., pp. 18-19), are uniformly cast in terms of Jupiter's charges for "transportation." Significantly, there is no reference to the other hydrocarbon services allegedly provided by Jupiter. Hence there is an implicit negation, at least as far as the literal language is concerned, of a right in Union to reimbursement from Tennessee of any separable or additional charge by Jupiter for these other services. This is particularly so since, as already noted earlier herein, Section 7 of the Jupiter Rate Schedule, relating to compensation, *i.e.,* the charge which Union claims the right to pass on to Tennessee in its entirety, expressly covers.

> "* * * compensation * * * for * * * services * * * in gathering the gas and condensate * * * and separating condensate from the gas * * * and for performing all other services provided for hereunder * * *." (R. 1693)

Thus if Pure intended its right to reimbursement to be co-extensive with its obligation to Jupiter, it was fully aware of how to achieve such a result.[25]

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[25] This provision dates back to at least 1957—about 5 years prior to the Pure settlement proposal in 1962.

That Union rights *vis a vis* Tennessee were not intended to include Jupiter's separable charges for non-transportation services is clear from the fact that Pure's "Motion to Amend Petition for Approval of Settlement Proposal" talked in terms of a base price of 16.75¢ per Mcf "plus reimbursement for actual payments by Pure to Jupiter for *transportation*" (R. 2581). Similarly, its Amendment to Settlement Proposal proposed that its rate for the instant sale to Tennessee be at the same 16.75¢ per Mcf base price "plus reimbursement of the actual payments Pure makes to Jupiter Oil Corporation for *transportation*" (R. 2590).

There is, we submit, no need to resort to dictionaries or other lexicographical works to ascertain that "transportation" as used in its normal and usual sense, would not include the separating, storing, or other nontransportation services allegedly provided by Jupiter in connection with Union's other hydrocarbons. Obviously, then, even if it be assumed for the moment that "transportation" as used in the Pure settlement proposal embraced the transportation of gas and other hydrocarbons, the literal language of that settlement proposal still is not such as to support Union's claims to a right to reimbursement from Tennessee for Jupiter's additional charge for *all* the other hydrocarbon services.

(b) The Commission's Order Approving the Pure Settlement

The Commission's order approving the Pure settlement (R. 2611-2615) similarly does not support Union's present argument. Like the Pure settlement proposals, the Commission's order is cast in terms of "transportation," thereby again excluding at least literally the non-transportation hydrocarbon services allegedly provided by Jupiter.

Moreover, there is no possible ambiguity in the Commission order as to whether "transportation" includes the transportation of other hydrocarbons. The Commission's order clearly discloses a Commission understanding that "transportation," as there used, referred to the transportation of gas. Thus, as the Commission expressly noted in the orders here under review (R. 3730, 3824), its order accepting the proposed settlement, summarized it in the following terms (R. 2613):

> "It [Pure] proposes a settlement rate of 16.75¢ per Mcf plus reimbursement of the charges Pure has to pay for transportation. *Pure has agreed to charge only that amount that it actually pays for transportation of the gas on shore* * * *."

Pure implicitly accepted this Commission interpretation by not applying for rehearing or clarification. Such conduct by Pure (now Union) eliminates any possible ambiguity in the settlement proposal as to whether it contemplated reimbursement by Tennessee for any separable additional charges which Jupiter may seek to make.

(c) Pure's Filed Rate

Likewise, the Pure-Tennessee contract amendment, executed subsequent to Commission approval of the rate settlement, now filed with the Commission as a supplement to Union's Rate Schedule No. 120, supports the Commission, rather than Union. As set out in Union's Brief at pp. 15-16 (see also R. 1984), that contract amendment provides for Tennessee to pay Union, in addition to the base price for the gas itself, "the average payment in cents per MCF" paid by Union to Jupiter *"for gas transported* which shall be determined by dividing the *total payment* made by the *total gas volume* on which such payment is based. * * *"

Contrary to Union's contention, the contract amendment did not provide for Tennessee to reimburse Union for any separable additional charges which Jupiter may make against Union for other services. The fulcrum of Union's argument in this respect is the phrase "total payment" in the formula for determining "average payment." However, that phrase obviously would not have the broad sweep urged by Union. Even Union would have to recognize that there are limitations upon the reach of that language. Such limitations obviously are ascertained from the context in which the phrase is used. And when "total payment" is read in the context of the contract amendment, the far more, if not, the only, reasonable construction, we submit, is that the phrase is limited to payments made for the transportation of gas. This is particularly so since Tennessee has no relation to these other hydrocarbons; only the natural gas is sold to Tennessee and the hydrocarbons are retained by Union.

To begin with, the contract amendment does not contain any reference to the transporting, or the providing of other services for other hydrocarbons, much less to any separable additional charge for these services. In contrast, the contract amendment is phrased solely in terms of gas transported. Moreover, the purpose of the formula in which "total payment" appears is to determine "the average payment in cents per MCF paid [to Jupiter by Union] for *gas transported*" (R. 1984). And the formula itself provides for the dividing of the "total payment" by "the total *gas* volume on which such payment is based * * *" (R. 1984). Plainly, the context in which "total payment" appears limits its scope to the payments made for the transportation of gas.

This reading is reinforced by the facts (1) that, as is apparent from Section 7 of Jupiter's Rate Schedule No. 7,

Union's predecessor, Pure, was fully aware of how to indicate that the charges were to embrace more than the transportation of gas if it so intended, and (2) that the contract amendment was itself entered into in furtherance of the Commission order accepting Pure's proposed rate settlement. As shown above, the Commission there construed the proposal as providing for reimbursement by Tennessee of only the charge made by Jupiter for transporting the Rollover gas and Pure did nothing to alert the Commission of any disagreement with this construction. In these circumstances, the presumption is very strong that the contract amendment followed the construction set out in the Commission's order, and so, similarly limited the reimbursement by Tennessee to only Jupiter's charge for transporting Union's Rollover gas.

2. The Further Considerations Urged by Union Do Not Advance Its Position

Despite the impression which it tries to create to the contrary, Union finally recognizes, albeit indirectly and reluctantly, that the various documents relied upon by it do not go as far as it would like. Thus, with reference to these documents, Union expressly acknowledges (Br., pp. 22-23) that "the language * * * refers to 'transportation' by Jupiter and * * * makes no reference to the other services for which Jupiter is compensated." To bridge the gap, thus resulting in its argument, Union falls back to the claim (Br., pp. 22-29) that there are several reasons for construing "gas" as used in the above documents to include the other hydrocarbons and "transportation" as there used to include the other services allegedly provided by Jupiter. Union's arguments do not hold together.[26]

[26] We do not stop below to discuss Union's contention (Br., pp. 23-24) that to construe "transportation" in the documents as limited to the transportation of gas is inconsistent with the

(a) The "De Minimis" Nature of the Other Hydrocarbon Services

At various places in its brief (see, *e.g.*, pp. 16, 21, 23), Union urges that the other hydrocarbon services provided by Jupiter are *de minimis*. From this, Union contends (Br., p. 23) that "the portion of Jupiter's rate attributable to non-transportation services is practically *de minimis*," and hence that "the insignificant amount attributable to non-transportation services clearly justified characterizing all of the charge as being for transportation."

Tennessee agrees that both the other hydrocarbon services provided by Jupiter and the costs attributable thereto do, in fact, border on *de minimis*. Tennessee believes that it has already so demonstrated earlier herein. Tennessee further agrees that Union's proffered description fits Jupiter's rate to Pure at the time of the Pure settlement and prior to the Jupiter settlement. As shown earlier herein, not only did Jupiter's then rate consist of an all-inclusive unallocated charge for services in connection with the gas stream produced by Union from the Rollover Field, but the "major" service it provided was the transportation of gas and "* * * the vast bulk (if not all) of the rates [charged] * * * was intended to serve as recompense for that service" (see, R. 3821, 3822). Indeed, it was because of these characteristics of the earlier Jupiter rate that prior to the Jupiter rate settlement, Tennessee paid Union the full amount of Jupiter's charges in connection with Union's Rollover gas stream.

Commission's assertion of jurisdiction over the transportation of the other hydrocarbons while part of the gas stream. Quite apart from any question as to whether the Commission has jurisdiction with respect to such transportation, which as shown earlier herein, is not reached in this case, the alleged inconsistency is in fact nonexistent; the considerations bearing on the construction of a phrase in documents have no necessary relationship to those governing the scope of the Commission's jurisdiction.

Union's proffered description does not, however, begin to come close to the present situation with regard to the amounts which Jupiter is seeking to charge Union, and which Union in turn is claiming reimbursement from Tennessee. Ignoring the various formats in which it could be presented—*i.e.*, as two separate charges or as a single rate consisting of a composite of two charges (see, *supra*, pp. 30-31)—it is clear that since its rate settlement, Jupiter has, with Union's acquiescence, if not with Union's affirmative urging, sought to charge not only the one-cent settlement rate for only the transporting of Unions gas, but also a separable additional amount for the other hydrocarbon services.

With Jupiter's fixing the latter amount by taking the difference between the 3.4 cents per Mcf pre-settlement average rate and the one-cent settlement rate, this additional amount to which Union asserts a right to reimbursement from Tennessee is about 2.4 cents per Mcf of gas or 2.4 times the one-cent per Mcf of gas settlement rate. Thus, using 1962 figures for illustrative purposes, the total annual charge for transporting Union gas would amount to only about $325,000,[27] whereas the *additional* amount claimed for the other hydrocarbon services would aggregate about $778,000 annually.[28] Such additional amount is hardly an insignificant or *de minimis* sum.

(b) Tennessee's Alleged Practical Interpretation

The foregoing is also dispositive of Union's further claim, based on Tennessee's alleged practical interpretation (Br. pp. 24-25). In this regard, Union asserts that for over four years subsequent to the Pure rate settlement, Tennessee paid Union the same amount that Jupiter billed it; accord-

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[27] 32,437,199 Mcf of gas (R. 3388) times 1.0 cent.
[28] 32,437,199 Mcf of gas (R. 3388) times 2.4 cents.

ingly, Union urges that such action by Tennessee represents a practical recognition by Tennessee of an obligation, under its Rate Schedule No. 120 to reimburse Union for the full amount of Jupiter's charges for services rendered.

The difficulty with this argument is that it ignores the vast differences just pointed out between Jupiter's pre-settlement rate situation and that which has prevailed since the Commission accepted Jupiter's settlement proposal. As there shown, Jupiter's pre-settlement rate was an all-inclusive unallocated rate for all services performed by Jupiter in which the principal service provided by far was the transportation of gas, and the bulk, if not all, of the amount charged was for the transportation of gas. In these circumstances, Tennessee's payment to Union of the full amount then being charged by Jupiter merely reflects a recognition by Tennessee of an obligation to reimburse Union for the payments made by it to Jupiter for the transportation of gas, with the amounts, if any, for the other hydrocarbon services being not only unallocated, but so insignificant as not worth taking the time, or making the effort, to separate them out.

It plainly does not reflect, as now urged by Union, a recognition by Tennessee of an obligation to reimburse Union for all of Jupiter's charges including the additional separable charges which Jupiter has been trying to make for the other hydrocarbon services since the Jupiter settlement. To the contrary, as applied to the post-settlement situation, Tennessee's pre-Jupiter settlement payments to Union are wholly consistent with the Commission's holding here that Tennessee is obligated to reimburse Union only for those payments which Union makes to Jupiter for the transportation of gas.

Indeed, Union's own actions herein implicitly acknowledge the weakness of its argument in this regard. As noted earlier herein, Union rejected statements submitted by Jupiter consisting (1) of a charge of one cent per Mcf for the transportation of gas plus a reservation of the right to charge separately for the other services provided, and (2) of two separate billings, one for one cent per Mcf for the transportation of gas and the other charging the difference between average rate of 3.4 cents per Mcf and one cent per Mcf of gas for the other hydrocarbon services. Instead, Union insisted that at least on their face, the statements submitted by Jupiter should appear to charge an all-inclusive unallocated rate for the various services provided. Since such insistence could only have been designed to provide Union with a basis for claiming reimbursement for the full amount of its payment to Jupiter, it plainly manifests recognition by Union that absent such artificial creation of a single total charge, it would be not have even a superficial basis for claiming reimbursement for the full amount from Tennessee.

(c) Alleged Industry Practice

Likewise, the vast differences between the pre-Jupiter settlement situation and that prevailing since the Commission's acceptance of Jupiter's settlement offer, destroy Union's further argument (Br., pp. 25-26) that its claim for reimbursement of Jupiter's separable additional, charge for other hydrocarbon services is also supported by industry practice.

As Union properly points out (Br., p. 25), it is very common for a pipeline gas purchaser to provide other hydrocarbon services. This practice has developed in the past because, as in the pre-Jupiter settlement situation, the costs attributable to these services are recognized as

being relatively minor as compared to the cost of the primary function of transporting the natural gas involved. See *Continental Oil Company, supra,* 27 F.P.C. at 150. In addition, typically in these cases, ownership of the hydrocarbons is retained by the producer of the gas purchased by the pipeline, and the providing of these other hydrocarbon services by the pipeline is part of the total consideration which it paid for the gas. *Continental Oil Company, supra,* at 107. As a result, not only does the pipeline purchaser have control over the costs involved in providing these additional services, but there is no reason to make a separable charge therefor.

This, however, is very different from the post-Jupiter settlement situation discussed above, where the amount which Jupiter seeks to charge for such services and for which Union claims reimbursement from Tennessee is readily separably and highly substantial, if not bordering on the extravagant. It also differs from the post-Jupiter settlement situation in that in the latter the other hydrocarbon services are being furnished by someone other than the purchaser of the gas and the purchaser has no control over, or voice in, the determination of the amount allegedly subject to reimbursement. Such a "carte blanche" would be most unusual if not unprecedented and further would destroy any incentive which Union might otherwise have had to keep the level of these payments down. In these circumstances, the Commission was eminently correct in holding (R. 3738) that it would have been "most peculiar" for Tennessee's contract with Union to have obligated Tennessee to reimburse Union not only for Jupiter's charge for transporting gas, but for whatever payments in addition Union might make to Jupiter for other hydrocarbon services.

(d) Alleged Conduit

Finally, there is no substance to Union's claim (Br., pp. 26-28), based on various excerpts from the Examiner's Initial Decision in the Jupiter rate case, that Union was intended to be only a conduit between Tennessee and Jupiter with respect to Jupiter's charges in connection with Union's Rollover gas stream.

Union reads much too much into these excerpts. Apart from the fact that two of the three excerpts quoted deal specifically with the situation there prevailing, *i.e.*, prior to the Jupiter rate settlement, the Examiner's Initial Decision leaves no doubt that he did not construe the Jupiter Rate Schedule as authorizing Jupiter to assess a separate charge against Union for other hydrocarbon services. Instead, it was his understanding — and that of the Commission, as shown earlier herein — that the Jupiter Rate Schedule limited Jupiter to a single charge for all services furnished with the bulk, if not all, constituting compensation for the transportation of gas.

It was on the basis of this understanding that the Examiner talked in terms of Union passing on to Tennessee any reduction in the rate being charged by Jupiter. There is nothing in that Examiner's Decision — nor in any Commission order in these extensive proceedings for that matter — to suggest even a basis for an inference that Union was to be a conduit between Jupiter and Tenessee in the event that Jupiter sought to exact from Union separable additional charges for other hydrocarbon services.

B. Union Has Neither Been Denied a Requested Hearing Nor Has It Preserved the Alleged Error

Although Union claims (Br., pp. 29-32) that the Commission has erred in denying a hearing which it allegedly

requested on October 18, 1967, no such question is properly before this Court at this time. It is well established that before any claim of Commission error may be considered by this Court, the claim must have been reserved in Union's application for rehearing. Section 19(b) of the Natural Gas Act expressly provides:

> "No objection to the order of the Commission shall be considered by the Court unless such objection shall be urged before the Commission in the application for rehearing * * *."

See, *e.g., F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649 (1945).

Neither Union's application for rehearing (R. 3741-3750) nor its Answer (R. 3451-3466) to Tennessee's June 1, 1967, petition seeking declaratory relief with respect to the Commission's earlier orders (R. 3440-3445), which the application for rehearing incorporates by reference, contains, or refers to, any request for a hearing with respect to Tennessee's petition. *A fortiori,* in neither of these documents did Union claim that the Commission erred in failing to hold hearings on the petition of Tennessee or that failure to hold such hearings would be prejudicial to Union's rights.

The only reference to these documents to a hearing is directed to the Commission's action taken in connection with Section 5(a) investigation of Jupiter's rates which culminated in the 1966 Jupiter rate settlement. The Commission order accepting Jupiter's rate settlement has long since become final and nonappealable. Moreover, Union's arguments in this regard, *i.e.,* that since it was not a party to the Jupiter rate investigation, and had not participated in the hearings held in connection therewith, the Commission's order accepting Jupiter's settlement proposal was

not binding on it (R. 3458, 3746-3747, see also 3695-3696), are patently devoid of substance. As the Commission pointed out, "Pure [Union] was served with a copy of the Commission order * * * instituting the investigation of Jupiter's rates" (R. 3737, fn. 9) and so "was or should have been, well aware of [that] case from its initiation" (R. 3736-3737). Accordingly, as the Commission further noted (R. 3737, see also R. 3824):

> "[Union's] decision not to intervene and participate as a party was its own. Morever, with special reference to the settlement agreement, Union was not only advised both of the settlement offer and a prior one, but filed comments thereon with the Secretary of the Commission.[10] It is true that in these comments Union objected to the settlement (as did Phillips); but if it did not like the result (and if the result in part injured Union) it was free to seek rehearing and court review. It chose not to do so.
>
> "[10] Union's letters, filed April 15, 1966 [R. 3357-3358] and June 2, 1966 [R. 3397]."

Finally, it should be noted that while Union, in a letter dated October 18, 1967, (R. 3646-3647) did advert to the desirability of a hearing with reference to Tennessee's June 1, 1967, petition, no suggestion was there made that such a hearing was required to protect Union's rights. Thus, in its October 18, 1967, letter, Union referred to the pleadings in the litigation pending in the Federal District Court urging that primary jurisdiction resided in the Commission, and in light thereof:

> "* * * respectfully urge[d] that the Commission schedule its hearings * * * at the earliest possible date due to the growing procedural complexities of these complicated multi-party proceedings, and the unabated inequties in a further delay thereof" (R. 3647)[29]

[29] In thus suggesting an early hearing, Union was seeking something concrete from the Commission in furtherance of its position on the primary jurisdiction question.

In contrast to Union's present contention (Br., p. 31), there is no claim in that letter that a hearing is required to protect Union's rights. Nor was any claim there made that a hearing should be provided to enable Union to make a showing such as that now set out in its brief (at p. 30). In this connection, it is noteworthy that many of the matters on which Union now alleges it would have submitted evidence (see Union Br., p. 30) are merely reiterations of Union's arguments on the merits made earlier in its brief herein. Since the evidence which Union now claims it would have submitted would apparently consist primarily of a restatement of these arguments in the form of testimony, the absence of a hearing has not resulted in prejudice to Union. For this reason as well, the Commission's failure to hold a hearing does not constitute error.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the portion of the Commission's orders here under review relating to the Union controversy be affirmed.

Respectfully submitted,

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February 10, 1969

In The

United States Court of Appeals

For The District of Columbia

Nos. [redacted], 22154, and 22442

Union Oil Company of California,
Petitioner,

v.

Federal Power Commissioner,
Respondent.

On Petition To Review An Order Of The Federal Power Commission

Petitioner's Reply Brief

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Petitioner's Reply Brief

I

INTRODUCTION

This brief is written in reply to the briefs submitted by Tennessee Gas Pipeline Company, a division of Tenneco Inc. (Tennessee), Intervenor, and the Federal Power Commission (Commission), Respondent. Because the questions involved in the proceedings to which Union is a petitioner are more fully discussed by Tennessee, most of this brief is in response to Tennessee's arguments. To the extent that the Commission's arguments differ from those of Tennessee they will be dealt with separately. The three primary areas involved in these proceedings and which will be considered in this brief are (1) Jupiter's right to charge more than 1 cent per Mcf for its services, (2) the Commission's holding concerning Union's right to charge Tennessee, as part

of the price of its gas, only 1 cent per Mcf in addition to the base rate, and (3) the Commission's refusal to grant Union a hearing on the matters involved in the proceedings below.

II

JUPITER'S RIGHT TO CHARGE UNION MORE THAN ONE CENT PER MCF FOR ALL OF ITS SERVICES.

In the first part of its brief, Tennessee argues that under Jupiter's Rate Schedule No. 7, as amended pursuant to its rate settlement, Jupiter does not have the right to make any charges for the other hydrocarbon services allegedly furnished Union, in addition to the 1¢ per Mcf charge there provided for. Tennessee points out that the 1966 rate settlement did not provide Jupiter with a right to charge separable additional compensation for other hydrocarbon services and that the Commission's April 3 order does not enhance Jupiter's rights to make any such separable additional charges.

Generally, Union agrees with the position expressed by Tennessee concerning the question of Jupiter's right to receive compensation in addition to the 1¢ per Mcf rate. There are, however, several critical points which should be made.

Prior to the Jupiter rate settlement Jupiter's rate schedule contained no provision under which Jupiter could make a separable additional charge for other hydrocarbon services. The contract and rate schedule provides for a unitary all-inclusive rate. It is significant to note that in the Jupiter rate proceedings, the Hearing Examiner, after full hearings, found that Jupiter's total cost of service (including profit) for all services rendered was .632¢ per Mcf. Accordingly, it would be reasonable to assume that the Commission's

allowance, pursuant to its settlement agreement with Jupiter would constitute Jupiter's total compensation for all of the services that it renders.

The Jupiter rate settlement abrogated the Union-Jupiter contract that was the basis for Jupiter's Rate Schedule No. 7 and created the problem before the Court. Prior to the Jupiter settlement there was no question as to the amount of payment to be made by Union to Jupiter. Similarly, there was no question as to Tennessee's obligation to reimburse Union at the same rate per Mcf that Union paid Jupiter. The present uncertainty was created because the Commission flatly refused to determine whether the 1¢ per Mcf rate established pursuant to the rate settlement included compensation to Jupiter for all other services rendered by it. See briefs of Union (pp. 8-10), Tennessee (pp. 23-25), and the Commission (pp. 8-9). The Commission's refusal to decide this question, i.e., the effect of the abrogation of the Union-Jupiter contract, was unexplained. Probably the Commission hoped that the question would go away.

The unresolved problem did not disappear. Jupiter decided to try to benefit by the Commission's recalcitrance and took the position that the Commission's rate investigation and the Jupiter settlement which was the product of about five years of legal maneuvering did not at all affect the rate that it would charge Union. Before the rate settlement Jupiter had been entitled to charge Union 3.4¢ per Mcf. After the settlement Jupiter began claiming that the 1¢ per Mcf established by the settlement related only to the rate for transportation of the product sold by Union to Tennessee and that it was entitled to an additional 2.4¢ per Mcf on the same volumes as compensation for other services rendered by it.

As the result of Jupiter's action, the question of the effect of the abrogation of the Union-Jupiter contract was again placed before the Commission. The April 3 order of the Commission that is here under review was intended to be the Commission's response to the problem. Although the Commission did not totally refuse to deal with the question as it had in the past, its decision has generally left the question of Jupiter's entitlement to additional compensation for hydrocarbon services undecided.

As Tennessee correctly points out the decision of the Commission did not confer on Jupiter the right to charge Union a separable additional amount for the other hydrocarbon services. To the contrary, the Commission's order expressly provides

> "Union is . . . obligated to pay Jupiter 1.0¢ per Mcf pursuant to Jupiter's gas rate schedule No. 7." (R. 37-38).

If the Commission had said nothing else about Jupiter's right to charge Union, from Union'standpoint there would be no controversy. Such a result would be entirely consistent with the Hearing Examiner's finding that Jupiter's total cost of service including profit for all services rendered was .632¢ per Mcf.

The Commission, however, said more. It introduced the possibility that Jupiter might, in the future, be able to charge Union for additional services performed with respect to that part of the gas stream that Jupiter physically receives from Union but that is not purchased from Union by Tennessee. The Commission made it plain that it was not conferring the right to additional compensation. On the other hand, according to the Commission, the courts may conclude that Jupiter will have such a right.

The Commission predicated its decision not to determine the effect of the abrogation of the Jupiter-Union contract on the premise that this was a "contractual" issue. (R. 3735, 3737) According to the Commission the question is one of "private obligation" and "any judicial remedy . . . may well be a matter of equity rather than of law." (R. 3735) Similarly, in its brief before this Court the Commission refers to "the contract reformation question involved in the private court suit." (Commission's Br., 30)

The meaning the Commission's holding concerning "private contractual disputes" and "reformation" is totally unclear. To what contractual dispute is the Commission referring? There is no contractual dispute. The Jupiter-Union Hydrocarbon Gathering and Separating Agreement is not unclear. It provides for unitary rate which has averaged out to be about 3.4¢ per Mcf for all of the services rendered by Jupiter.

The contract has, however, been abrogated by the Commission's Jupiter settlement order. The dispute is not contractual—rather it concerns the legal effect of the Commission's order—a question that certainly may not be characterized as involving only private contractual issues.

The reference by Tennessee and the Commission to the "contract reformation question involved in the private court suit" is equally confusing. "Reformation" refers to the remedy, afforded by courts of equity, to written instruments which import a legal obligation, to reform or rectify such instruments whenever they fail, through fraud or mutual mistake, to express the real agreement or intention of the parties. To reform an instrument is to ascertain the real and original intention of the parties and to decree that the instrument be held and construed as if it fully expressed that intention. There is no question as to the intention of the parties which was clearly and accurately reflected in the

contract. The question that underlies this entire litigation is what is the effect of the abrogation of the contracts that Jupiter had with the producers.

The Commission cavalierly treated the basic and controlling question of Jupiter's right to collect additional amounts for services relating to liquid hydrocarbons by talking about "reformation" and "private contractual disputes" in the Illinois courts. The Commission simply used "legalese" to pass the buck to the courts on this difficult question..*

III

THE COMMISSION'S HOLDING THAT UNION MAY RECOVER ONLY 1¢ PER MCF FROM TENNESSEE IN ADDITION TO ITS BASE RATE

A. Factual Background.

Tennessee's and the Commission's position is, of course, that the Commission correctly held that Union is authorized to charge Tennessee no more than 1¢ per Mcf over and above its base rate as the price for the gas bought by Tennessee. A consideration of their arguments demonstrates the incorrectness of the Commission's order. Before

* As noted in Union's initial brief (p. 10-12) Jupiter has brought suit seeking a determination that the Jupiter rate investigation and settlement did not affect the amount owed Jupiter by Union and that the proper rate for all of its services it performs under the contract with Union is 3.4¢ per Mcf. The federal district court, on motion of Tennessee and Union stayed these judicial proceedings on the grounds that the matters in controversy were within the primary jurisdiction of the Commission. The district court will, after termination of these proceedings, be expected to continue the litigation of Jupiter's claims. The decision of the Court to stay Jupiter's action on the grounds of primary jurisdiction was based, *inter alia,* on its determination that the case does not simply involve private contractual issues. Unless the Commission's April 3 order is reversed, the district court will discover that the Commission has refused to assist it in determining the effect of abrogation.

turning to the specific arguments it is helpful to set forth a description of the specific transactions around which this controversy revolves:

(1) The Rollover gas stream is produced at Union's offshore platform, is dehydrated, and the condensates are separated out for measurement purposes. After measurement, the condensates are returned to the gas stream. This separation is accomplished by Union and not Jupiter. (R. 1696-1697.)

(2) The commingled stream is delivered to Jupiter for transportation on shore through its 8.44 mile line to a point approximately 1,000 feet inland, where the line connects with two lines owned by Tennessee.

(3) The gas stream is then transported through Tennessee's lines about 29 miles further inland to Jupiter's separation plant.

(4) At Jupiter's separation plant (essentially the same as Union's on the offshore platform) the condensates are separated by Jupiter and are delivered into Union's storage tanks.

A. Under Jupiter's rate schedule, Jupiter has agreed to erect the plant to mechanically separate condensate from the gas and has agreed to redeliver the condensate to Union "*free* of cost and expense." (R. 1697-1698.)

B. Under Jupiter's rate schedule it has agreed that it would furnish "*free* of cost" to Union "a location upon which [Union] may erect and maintain storage facilities. . . ." (R. 1697) The actual storage facilities are "furnished by [Union] at [Union's] expense." (R. 1696).

C. The Jupiter-Union agreement provides that the volumes of gas to which Jupiter's rates to Union are applicable are determined after the removal of the condensate. Accordingly it is the volumes present at this stage in the transaction that are used to determine Union's liability to Jupiter.

(5) Jupiter redelivers the gas stream (the condensates having been removed) to Tennessee at the outlet of the Jupiter separation plant.

(6) Tennessee transports the gas stream approximately 8½ miles further inland through Tennesee's lines to Phillips' Lake Arthur processing plant.

(7) At Phillips' Lake Arthur processing plant the liquefiable hydrocarbons are removed from the gas stream and the remaining gas is redelivered to Tennessee.

The volumes of gas received by Tennessee at this point, after removal of the condensate (step 4 above) and after removal of the liquefiable hydrocarbons (step 7 above) are the volumes that are utilized under the Tennessee-Union contract for determining all the payments made by Tennessee to Union as the price of the gas.

An understanding of the various steps involved in the transaction giving rise to the present controversy is critical for several reasons. First, it demonstrates the relatively limited role played by Jupiter in the transaction and the fact that its charges are entirely for transportation. Secondly, and of critical importance, it demonstrates that Union is not entitled to recover from Tennessee the entire payment made by Union to Jupiter. The volumes on which

Tennessee's payment to Union are to be based are the volumes actually received by Tennessee and that belong to it. Apparently the Commission was unaware of this fact and its opinion indicates that it understood that Union argued that Tennessee's payment was to be based on volumes of gas that Tennessee does not receive (R. 3738).

B. Union's Filed Rate.

As previously discussed (Union's Brief 13-17) under the filed-rate doctrine the effective rate on file with the Commission—the rate reflected in the Pure-Tennessee contract amendment—is the only rate that may be charged and collected by Union until such time as the Commission, addressing itself to the specific rate in an appropriate proceeding, orders that it be prospectively changed under section 5 of the Natural Gas Act. Accordingly, in ascertaining Tennessee's obligation to pay Union it is appropriate to look solely to the terms of the filed rate.

1. Tennessee's Position.

Tennessee does not deny the validity of this legal position but argues that the interpretation of the Union-Tennessee contract urged by Union is incorrect. In support of its position Tennessee asserts

> "Contrary to Union's contention, the contract amendment did not provide for Tennessee to reimburse Union for any separable additional charges which Jupiter may make against Union for other services." (Tennessee's Br., p. 37)

Union does not contend that Tennessee-Union contract provides for reimbursement of separable additional charges. The contract was made at a time when there were no such separable additional charges and obviously there was no

occasion for the parties to contract about non-existent problems. The parties did, however, contract that Tennessee would pay Union, as a part of the price of the gas it was buying

> "the average payment in cents per Mcf paid to the Jupiter Corporation by the Pure Oil Company for gas transported, which shall be determined by dividing the *total payment* made by the Pure Oil Company to the Jupiter Corporation by the total volume on which such payment is based . . ." (Emphasis added)

The plain and unequivocal meaning of this language is that Tennessee would pay Union the same rate per Mcf paid by Union to Jupiter. The rate per Mcf would be applied to different volumes of gas since Tennessee did not receive the condensates and liquefiable hydrocarbons. The rate per Mcf itself, however, is the same.

Attempting to avoid the plain and unambiguous meaning of the formula for determining the payments to be made by Tennessee to Union, Tennessee argues that the term "total payment," "obviously would not have the broad sweep urged by Union." Thus Tennessee insists that the phrase "total payment" does not mean total payment but rather only "payments made for the transportation of gas." (Tennessee's Br., p. 37). Tennessee is simply asking this Court to hold that the contract does not mean what it says. More important, the interpretation urged by Tennessee would have been totally unrealistic. At the time that the parties entered the contract there were no payments made for the transportation of gas acquired by Tennessee. There were simply payments made by Union to Jupiter. To have arrived at a different formula per Mcf than that used for the Jupiter-Union contract

would have required a very complicated contractual explanation as to the method to be used. Absent an agreement on an arbitrary basis of allocation there would have been absolutely no way for the parties to have ascertained the amount of the payment for transportation which Tennessee urges the parties contracted to use to determine Tennessee's payments to Union. It would be most interesting to see Tennessee explain to this Court how its contractual obligation, as it now describes it, would have been determined. Furthermore, Tennessee's argument is belied by its own interpretation of the contract. As Tennessee concedes, for over four years after the Tennessee-Union contract amendment, Tennessee paid Union at a rate that is determined by taking the total payment made by Union to Jupiter and dividing it by the volumes of gas on which such payment was based — the same rate per Mcf that Union paid Jupiter. Under the contract there was no other basis on which it could pay Union.

Tennessee places great importance on the fact that Tennessee has no relationship to the condensate or the liquid hydrocarbons. Union is not arguing that Tennessee does have any relationship with this part of the gas stream and emphasizes that the volumes on which Tennessee's payments are based do not include the condensate or liquefiable hydrocarbons. Tennessee's relation or lack of relation to the hydrocarbons or condensate is irrelevant to the price that it agreed to pay Union for the gas it acquires. Tennessee is not paying for transportation but rather is paying for gas — and the price it pays has 2 components: (1) The base rate, and (2) The payments per Mcf paid Jupiter by Union.

2. The Commission's Position.

The Commission expressly agrees that the Union-Tennessee contract amendment represents the "filed rate" which must be observed by both parties, until changed by appropriate Commission action. Fundamentally, the Commission takes the same position as Tennessee and argues that the term "total payment" used in the Union-Tennessee contract does not mean the total payment made by Union to Jupiter but has reference only to the payments made for Jupiter's transportation of the gas that is sold by Union to Tennessee. Indeed, the Commission argues that there is "no basis" for Union's interpretation. Thus the Commission, like Tennessee, completely ignores the fact that there is absolutely no factual way the parties could have intended the term "total payment" to refer to the payments for the transportation of the gas sold by Union to Tennessee. No such payment was made and under the contract there was absolutely no basis for making any kind of calculation by which the amount of such payment could have been determined. Thus the Commission, like Tennessee, is claiming that the term "total payment" had reference to a payment that did not exist. Union does not deny that the parties could have agreed upon an arbitrary allocation of the total payment made by Union to Jupiter. It is obvious from the contract, however, that no attempt was made to make such an allocation.

C. Tennessee's Practical Interpretation of the Contract.

In its initial brief Union pointed out that for over four years Tennessee made payments consistent to the interpretation of the contract now urged by Union but rejected by Tennessee. The significance of Tennessee's conduct is twofold: (1) it is very strong evidence of the meaning of the various arguments involved, especially the Union-Tennes-

see contract, and (2) it demonstrates the fallacy of the basis of the Commission's decision, *i.e.*, that such a payment by Tennessee would be "most peculiar."

1. Tennessee's Position.

Tennessee admits that for over four years after agreeing to the Union-Tennessee contract Tennessee paid Union for the gas that it bought, a base rate plus the same rate per Mcf that Union paid Jupiter.

Tennessee argues that the "difficulty" with Union's position that Tennessee's interpretation of the contract demonstrates the contract's meaning in that this position "ignores the vast difference . . . between Jupiter's presettlement rate situation and that which has prevailed since the Commission accepted Jupiter's settlement proposal." This position is obviously untenable. There is no way that the Jupiter settlement, occurring over four years after the making of the Union-Tennessee contract amendment, could effect the meaning to be given that contract amendment or the significance that must be attached to Tennessee's interpretation of the contract. The subsequent agreement between the Commission and Jupiter can hardly change the agreement between Tennessee and Union.

Tennessee also seems to argue that its interpretation of the contract for four years is not significant because during this period of time the payments made by Union to Jupiter were unallocated and too insignificant to be separated out. The monetary significance of the services rendered by Jupiter have nothing to do with the fact that Tennessee did agree to pay a rate that is the same rate paid by Union to Jupiter.

2. The Commission's Position.

The Commission argues that Tennessee's payment to Union of the same rate per Mcf that Union pays Jupiter does not support Union's position because Jupiter's filed rate for the gas transported to Tennessee and its contractual rate were the same. Therefore, according to the Commission, there would have been "no basis" for Tennessee to have paid less than 3.4¢ per Mcf to Union.

The fallacy in this position is obvious: the 3.4¢ per Mcf rate paid by Union to Jupiter pursuant to the Union-Jupiter "Hydrocarbon Gathering and Separating Agreement" and Jupiter's filed rate was for all of the services rendered by Jupiter, not simply for the transportation of gas bought by Tennessee. If, as the Commission and Tennessee have argued, it was not intended that Tennessee pay the same rate that Union pays Jupiter, there would clearly have been a basis for Tennessee paying less than 3.4¢ per Mcf. The critical thing that Union is trying to impress upon this Court is that the controlling question is the meaning of the Tennessee-Union contract as amended in 1962. The events occurring after 1966 with respect to Jupiter certainly cannot change the prior agreement of Tennessee and Union. No party can deny that for four years after the contract amendment and until the Jupiter settlement, Tennessee paid Union at exactly the same rate that Union paid Jupiter.

D. Industry Practice.

Neither Union nor Tennessee denies that it is common practice for a pipeline purchaser to provide, and therefore bear the cost of, liquid hydrocarbon services, including the costs of transporting the liquid hydrocarbons and condensates. According to Tennessee this practice has developed because (1) "the providing of these other hydrocarbon services by the pipeline is a part of the total consideration

which it paid for the gas;" and (2) because the costs attributable to these services are recognized as being "relatively minor as compared to the cost of the primary function of transporting the natural gas involved." (Tennessee's Br., 42-43)

Tennessee's asserted reasons for the existence of this practice certainly does not distinguish the present situation. In the first place, Tennessee can hardly argue that the amounts which it has paid per Mcf in addition to the base rates are not payment for the gas. The contract expressly provides that this amount per Mcf is a part of "the price to be paid by buyer to seller for all the gas. . . ." (R. 1980)

With respect to the "relatively minor" costs attributable to these services as compared to the cost of the primary function of transporting the natural gas involved, there is no reason to believe that the amount, if any, that Jupiter may be able to obtain from Union for additional services will be anything other than "relatively minor" compared to the cost of transporting the natural gas sold to Tennessee. Certainly the fact that Jupiter claims that it is entitled to an additional 2.4¢ per Mcf for these services does not mean that it is entitled to recover anything approaching that amount. Moreover, as discussed below, the formula for determining the price to be paid by Tennessee to Union should include as a factor only amounts properly paid by Union to Jupiter—not amounts improperly paid.

It is true that typically the pipeline that bears the cost of the additional services relating to condensates and liquefiable hydrocarbons performs the function itself and therefore has greater control over the costs of rendering such services. This, however, has nothing to do with the fact that the costs are incurred by the pipeline—precisely what the Commission incorectly described as "most peculiar". The Commission predicated its conclusion that

Tennessee had no obligation on its conclusion that it would be "most peculiar" for Tennessee to bear the cost of transporting part of the gas stream that it does not receive. The Commission made no reference to the peculiarity of the manner by which the pipeline assumes its obligation.

Finally, it should be noted that when Tennessee agreed to pay, as a part of the price for the gas it was purchasing, the same rate per Mcf that Union pays Jupiter, it was not agreeing to pay all of Union's costs associated with Jupiter's services. Tennessee pays Union only on the basis of the volumes it purchases, which does not include the volumes of liquefiable hydrocarbons and condensate.

E. Amounts Properly Paid by Union.

As previously discussed a component of the amount of the price paid by Tennessee to Union for the gas acquired from Union is a price per Mcf which is determined by dividing the "total payment" made by Union to Jupiter by the volumes of gas on which such payment is made. The resulting figure per Mcf is, by definition, the rate that is paid per Mcf by Union to Jupiter.

Tennessee places great reliance on the fact that Jupiter is claiming an erroneous and exorbitant amount for its additional services. It seems to argue that this fact, in itself, has some influence on the meaning of a contract made four years before Jupiter began making its ridiculous claims. Although the extravagance of Jupiter's claims cannot affect the meaning of the 1962 agreement, Union admits that it would be doubious to hold that Jupiter may charge whatever it pleases and Union may pay to Jupiter whatever it pleases and that Tennessee will be required to utilize the amount of such payments as the basis for determining part of the purchase price of the gas that it acquires from Union.

For example, through clerical error Union might overpay Jupiter. It would not be appropriate to include such an overpayment in the formula used to determine Tennessee's purchase price for gas. The present situation also affords an example of this conclusion. Jupiter claims 2.4¢ per Mcf for the services that it renders in addition to the transportation of Union's gas that is sold to Tennessee. For the reasons stated in Tennessee's brief at pp. 20-23 these services are insignificant compared to the transportation of Union's gas that is sold to Tennessee. Indeed, the amount per Mcf now claimed by Jupiter for services relating to the condensate and liquefiable hydrocarbons is well in excess of the value of the condensate and liquefiable hydrocarbons as products. In short, Jupiter's claim is absurd.

For several months Union erroneously paid the total 3.4¢ per Mcf billed by Jupiter as if the Jupiter contract had not been abrogated by the Commission. In turn, it sought to charge Tennessee 3.4¢ per Mcf for the volumes of gas bought by Tennessee. It is critical to note, however, that Union discontinued making any payments to Jupiter and has, as a result, accomplished an offset of the payments previously made in error. As far as Union is concerned Jupiter is not entitled to receive anything in addition to the 1¢ per Mcf allowed by the Commission's April 3 order. At the same time, as previously discussed, the Commission's April 3 order leaves open the possibility that a court may find that in the future Jupiter is entitled to receive something in addition to the 1¢ per Mcf allowed by the Commission. Assuming that Union is correct in its conclusion that the 3.4¢ per Mcf charged by Jupiter was not correct, Tennessee correctly refused to pay this amount. Tennessee should be required to pay the same rate per Mcf that Union properly pays Tennessee. In the event that it is ultimately determined that Jupiter is entitled to recover any additional

amounts, certainly these amounts must bear reasonable relationship to the value of Jupiter's services* or their payment by Union would be improper and should not be used as a part of the purchase price of gas sold to Tennessee.

F. The Pure Settlement Agreement.

The responses of the Commission and Tennessee to Union's position regarding the meaning to be attributed to the Pure Settlement Agreement are generally the same. Following the approach of the Commission's decision, each brief harps on the phraseology of one sentence in the Commission's order accepting the settlement and ignores more specific language of the settlement order and practically all of the language of Pure Settlement Proposal. While this ostrich-like approach makes brief writing easier, it is of little assistance to a Court seeking to properly interpret the various instruments.

Generally, Union's initial brief (at pages 17-24) adequately answers the contentions made by Tennessee and the Commission. Accordingly, there is no reason to repeat that analysis of these documents.

Two points should, however, be made. Both Tennessee and the Commission frequently rely upon the fact that the various documents involved in the Pure settlement agreement refer to Union's payments to Jupiter for "transportation". These arguments ignore the numerous references to the rate which do not refer to transportation. There is, however, an equally basic reason for concluding that the "transportation" reference does not refer only to the transportation of gas sold by Union to Tennessee. As previously discussed, at the time of the Pure rate settlement there was

* See discussion of the value of Jupiter's services at 19-20, *infra*.

no charge by Jupiter for transporting the gas bought by Tennessee from Union. Instead, Jupiter had a single unitary charge for everything that it did under its contract. Certainly the parties were not referring to a nonexistent charge.

There is another compelling reason to believe that the reference to transportation charges by Jupiter had reference to all of Jupiter's charges to Union. As elaborately explained by Tennessee (Tennessee's brief at 20-23), the services rendered by Jupiter other than those relating to the transportation of the gas acquired by Tennessee from Union were clearly "insignificant." As Tennessee states, they have been "in effect ignored until Jupiter recently latched on to them as a basis for making its present claims for additional compensation." (Tennessee's Br., 21) Not only are the total amount of services that Jupiter renders in addition to the transportation of the gas acquired by Tennessee "insignificant", but Jupiter has contractually bound itself to perform the nontransportation services "free" of charge to Union. Thus Jupiter has agreed that at its expense it will build and operate a separation plant and will separate the condensate from the gas delivered to it and redeliver it to Union "free of cost and expense to [Union]." (1697-98). Likewise, Jupiter agreed to furnish "free of cost to [Union] . . . a location on which [Union] may erect and maintain storage facilities . . . "for the actual storage of the condensate." The storage facilities themselves are "furnished by [Union] at [Union's] expense" (R. 1696). As for the liquefiable hydrocarbons, they are separated and stored long after the point that Jupiter has anything to do with the gas stream. See discussion at 7-8, *supra*. Since Union was paying only for transportation it is easy to understand why the parties (Union, Tennessee

and the Commission) would occasionally refer to Union's payment to Jupiter as being for "transportation."*

Tennessee essentially agrees with this analysis (Tennessee Br. 39) but seeks to avoid the consequences of its agreement, *i.e.*, a reversal of the Commission's holding that Tennessee may pay only an amount per Mcf equal to the amount paid by Union to Jupiter for the transportation of the gas sold to Tennessee, by arguing that this analysis has nothing to do with the situation existing *after* the Jupiter settlement where Jupiter is seeking to charge an extravagant rate. What Tennessee again ignores is that the instruments that the Commission purported to interpret in its April 3 order were drafted in 1962, long before the "present situation" came into being. The "present situation" can hardly influence the agreements of the parties reached four years earlier. Furthermore, Tennessee ignores the fact that it is unnecessary to accept Jupiter's ridiculous claim for 2.4¢ per Mcf. As previously discussed, if Jupiter is to collect any amount in addition to the 1¢ per Mcf permitted by the Commission's April 3 order, it must be relatively insignificant as compared to the transportation costs paid by Union to Jupiter for transporting gas sold to Tennessee.

IV
THE COMMISSION'S REFUSAL TO GRANT UNION A HEARING ON THE MATTERS INVOLVED IN THE PROCEEDINGS BELOW

Union requested the Commission to schedule hearings in the proceedings under review. It is Union's position that it was entitled to a hearing and that by virtue of the Commission's refusal, its April 3 order should be reversed and these proceedings should be remanded to the Commission for hearing.

* As discussed in Union's initial brief, there are numerous references to the charges of Jupiter for transportation as being 4¢ per Mcf and 3¢ per Mcf.

A. Tennessee's Position.

Tennessee's primary argument is that the question of the Commission's refusal to grant Union a hearing is not before this Court because Union failed to urge this objection to the order of the Commission in its application for rehearing as is required by section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r.*

A careful reading of Union's application for rehearing demonstrates that Union did raise the denial of hearing issue before the Commission on rehearing.

It had been argued that somehow the Jupiter rate settlement had affected Union's ability to charge Tennessee, as a part of the price for the gas purchased by Tennessee, the same rate per Mcf that Union was charged by Jupiter. Union's reaction to this argument included, *inter alia*, the fact that the Commission's order concluding the Jupiter rate settlement was not binding upon it because it was not a party to the Jupiter rate case. Union also pointed out that the Commission's order approving the Jupiter rate settlement clearly refused to deal with the question of Jupiter's ability to collect anything other than the 1 cent per Mcf and therefore did not determine whether Tennessee would pay Union any amount in excess of 1 cent per Mcf. Not even the Commission denies the validity of this position. However, in response to Union's argument that the Commission's order was not binding upon it because it was not a party to the Jupiter rate case, the Commission held that Union could have intervened and participated, was advised of the settlement offer and could have sought review of the Commission's order.

In paragraph III of its application for rehearing in the present proceedings, Union complained both (1) of the Commission's argument that it had waived its rights by

* The Commission does not make this argument and apparently concedes that Union raised the objection in its application.

not intervening and becoming a party in the Jupiter rate settlement and (2) of its refusal to grant a hearing in the present proceedings and issuance of an order, without hearing, affecting Union's vested rights. The application states in part:

> "The Commission could have brought about Union's participation in the Jupiter proceedings by consolidating Union's FPC Gas Rate Schedule No. 120 with such proceedings and making both Union and Tennessee (merely an intervenor) parties to the proceedings as Respondents. The Commission elected not to take this action. This inaction on the part of the Commission, *coupled with an order affecting Union's vested rights, but without a hearing* (although repeatedly requested by Union over a period in excess of a year) is a clear denial of due process to Union."

The italicized language does not refer to the Jupiter settlement order which, as Union noted in its application, did not affect Union's rights. Having expressly urged this objection to the order of the Commission in its application for rehearing, the question is properly before this Court.

Tennessee also argues that Union's request for a hearing expressed in its letter dated October 18, 1967 (R. 3646-47) did not satisfy the requirement of a request for a hearing since Union did not suggest that "a hearing was required to protect Union's rights." This argument is plainly specious — there is no authority whatsoever for the proposition that a request for hearing must contain a "suggestion" that a hearing is required to protect the requesting parties' rights. It would seem fairly obvious that parties to proceedings before administrative agencies do not request hearings unless they believe that hearings are necessary. Similarly, Tennessee cites no authority, and there is none, for the proposition that it is necessary that Union express in its

request for a hearing the showings that it expects to make in the event that the requested hearing is held.

B. The Commission's Position.

The Commission makes a similarly incorrect claim regarding Union's request for a hearing. In its letter of October 18, 1967, Union stated that it

> "respectfully urge[d] that the Commission schedule its hearings . . . at the earliest possible date due to the growing procedural complexities of these complicated multiparty proceedings, and the unabated inequities in further delay thereof." (R. 3647)

The Commission argues that this "hardly" amounts to a request for hearing but rather one for "expedition." Union admits that it was asking for expedition but submits that its request was not for expedition in the abstract but, as the sentence plainly expresses, expedition in the holding of a requested hearing.

The Commission argues that failure to hold a hearing was immaterial since the questions before the Commission as to the interpretation of the Union-Tennessee contract and the Pure settlement agreement involved only questions of law. Union agrees that if only questions of law were involved an evidentiary hearing would be unnecessary and accordingly does not quarrel with the decision in *Mississippi River Fuel Corp.*, v. *FPC*, 281 F. 2d 919 (1960), *cert. denied*, 365 U.S. 827 (1961). This case does not, however, hold that issues of fact may not exist where a court is interpreting a contract. The Court simply held that in that case there were no issues of fact and a hearing was not necessary.

It is clear that in the present case there were issues of fact. Indeed, the conclusion of the Commission that Union could not charge Tennessee more than 1 cent per Mcf in

addition to its base rate was predicted upon the factual conclusions of the Commission that such an arrangement would be "most peculiar." There is, however, nothing in the record that would support this factual conclusion of the Commission. Similarly Union should have had the opportunity to call witnesses from all parties who negotiated the Pure settlement who would have testified that the provisions of the Pure settlement concerning reimbursement by Tennessee were intended to require Tennessee to pay Union the same rate per Mcf that Union paid Jupiter. Additionally, Union should have been able to call witnesses to testify as to the intent of the parties in amending the Pure-Tennessee contract. This testimony would have substantiated the fact that Tennessee is obligated to pay Union the same rate per Mcf that is paid by Union for Jupiter's services. As discussed earlier by Union, the meaning of the term "total payment" in the Union-Tennessee contract is critical to the determination of the issues involved in the Union-Tennessee controversy. The Commission admits that the reference to "total payment" is "ambiguous" (Commission's brief at 26) but prefers to resolve the problem by by conclusionary arguments.

In addition to the evidence previously described in Union's initial brief that it would have introduced in the event that a hearing had been held, Union would have been afforded an opportunity to specifically call to the Commission's attention important factors that were ignored by the Commission's April 3 order. For example, the Commission completely ignores the fact that for over four years Tennessee paid the same rate per Mcf that Union paid Jupiter. Additionally, from its opinion, the Commission seems to believe that Union was arguing that Tennessee would have to pay for the gas acquired by Tennessee on the basis of the same volumes for which Jupiter charges

Union. If the matters in issue had been developed before the Commission, Union would have demonstrated that Tennessee pays only on volumes that it actually acquires from Union.

CONCLUSION

For the foregoing reasons Union respectfully requests that this Court reverse the order of the Commission and remand to the Commission with instructions to determine the total rate payable by Union to Jupiter and to order Tennessee to pay Union at the same rate per Mcf that Union pays Jupiter for the rendition of all of its services. Alternatively, Union requests that this Court reverse and remand to the Commission for hearing on the subject matter of these proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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REPLY BRIEF OF PETITIONER, THE JUPITER CORPORATION

In The

United States Court of Appeals

For The District Of Columbia Circuit

THE JUPITER CORPORATION, Petitioner vs. FEDERAL POWER COMMISSION, Respondent PHILLIPS PETROLEUM CO., et al., Intervenors	Nos. 22,154 22,693
UNION OIL COMPANY OF CALIFORNIA, Petitioner vs. FEDERAL POWER COMMISSION, Respondent TENNESSEE GAS PIPELINE COMPANY, et al., Intervenors	No. 22,442

ON PETITIONS TO REVIEW
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REPLY BRIEF OF THE JUPITER CORPORATION

I. THE INTERESTS OF THE PARTIES AND THE ABSENCE OF ANY PUBLIC INTEREST

The Jupiter Corporation (Jupiter), under one contract, (1) purchases natural gas from Phillips Petroleum Company and Kerr-McGee Corporation (Phillips-Kerr), (2) transports liquid condensate for Phillips-Kerr (which Jupiter believes is not subject to Federal Power Commission jurisdiction) and (3) performs other services for Phillips-Kerr which the Commission admits and has held are non-jurisdictional. Jupiter resells the natural gas to Tennessee Gas Pipeline Company, a Division of Tenneco, Inc. (Tennessee), at a Commission prescribed

price of 19.5 cents per Mcf for such gas. That price, not the Phillips-Kerr price to Jupiter, affects the price the gas consuming public pays, Jupiter does not contest that price, and nothing in these proceedings can affect that price. However, the Commission's action, if upheld, will help Phillips-Kerr because Jupiter will be prevented from collecting the full compensation which is due it under its contract with Phillips-Kerr. Therefore, the Commission orders here under review are irrelevant to the Commission's statutory duties and powers (since they cannot help or protect the public): instead, the Commission has simply intruded into a private contractual dispute.

Under a separate contract, Jupiter also transports the natural gas and liquid condensate of Union Oil Company of California (Union) and performs other services for Union which have been held to be non-jurisdictional. Unlike the Phillips-Kerr situation, however, Jupiter does not buy or sell the Union gas. Union sells it directly to Tennessee, and it is only the price for that sale, set by the Commission in other proceedings, which affects the public.* But Jupiter is simply seeking to protect its con-

* Union, in Case No. 22,442, claims the right to add more than one cent to that basic price if Jupiter collects more than one cent from Union, although nothing in excess of the one cent would be applicable to the gas sold by Union to Tennessee. That specious claim is wholly separate from Jupiter's appeals, but because of the claim, Tennessee argues (Brief, page 14, fn. 16) that there is a public interest consideration in holding against Jupiter in its appeals. The short answer is that as soon as this Court affirms the Commission's ruling in No. 22,442, this alleged public interest (and Tennessee's concern that it must pay more, and thus its interest in these proceedings) is eliminated. More basically, however, a "public interest" cannot be created out of Jupiter's claim for compensation for non-jurisdictional services simply because a third party claims it can collect a jurisdictional charge to pass on that compensation. And the Commission can control any possible impact upon the consumers through its regulation of Tennessee's rates.

tract rights to compensation from *Union,* not Tennessee, for non-jurisdictional services. Again, there are no public interest considerations, but rather Commission intrusion in a private dispute.

Phillips-Kerr do not even attempt to show any public interest considerations in their brief, and Union has not even intervened in Jupiter's appeals. The Commission brief also does not try to raise any true public interest support for its action, but instead claims that the Commission confined itself to regulating "that part of the gas stream delivered to Tennessee" (Brief, page 11), which is the only Jupiter activity which affects the gas consuming public.* But the Commission's true position** is that even though complete consumer protection has been afforded by regulation of Jupiter's sale price to Tennessee (and the one cent limit on Jupiter's compensation from Union for its *transportation of gas only*), the Commission wishes to "protect" Union and Phillips-Kerr from the consequences of their contracts with Jupiter. This, however, is unlawful, since there are no public interest-protection of the gas consumer issues involved.*** The Commission merely continues to fail to recognize the basic limitations which Congress has imposed upon its rate powers under the Natural Gas Act: that rate power "is largely a negative one" which is "designed to protect the *consumers* of natural gas" *Northern Natural Gas Co.* v. *FPC,* 399 F.2d 953, 964 (D.C. Cir. 1968) (emphasis added).

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* The Commission actually went far beyond that to regulate liquid condensate, which the Commission contends is part of the gas stream, but admits (Section III of its brief) is not delivered to Tennessee.

** Commission Brief, page 39, fn. 19.

*** Since no public interest is involved, no deference to Commission findings is required or warranted. See Section III.E of Jupiter's Initial Brief.

II. THE COMMISSION'S ORDERS UNDER REVIEW, RELATIVE TO JUPITER'S RIGHT TO COMPENSATION, ARE INVALID

A. The Issues Put In Focus

Jupiter receives 19.5 cents per Mcf from Tennessee; it has paid approximately 17.1 cents to Phillips-Kerr because its contract with Phillips-Kerr provides for the 17.1 cent price and Phillips-Kerr therefore cannot, under *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), lawfully collect more. Jupiter also believes that the fact that such contract establishes that Jupiter can retain approximately 2.4 cents per Mcf for the jurisdictional gas services and non-jurisdictional services it performs for Phillips-Kerr is relevant because, even though Jupiter has agreed, and the Commission has ordered, that no more than one cent per Mcf can be collected for *gas* transportation, the Commission cannot regulate non-jurisdictional charges (or the "non-jurisdictional part" of a unified charge). And as long as the price to Tennessee is not affected, the gas consumer is protected.

When Phillips-Kerr protested the 17.1 cent price, Jupiter filed a contract action in the Circuit Court of Cook County, Illinois, Case No. 67 L 12177. That court has not yet ruled on the merits, but pending trial *it has held,* after notice to the Commission and prior to issuance of any of the Orders here under review, that Jupiter need not pay the amount in controversy (the difference between 18.5 cents and 17.1 cents) to Phillips-Kerr or into escrow, but can continue to pay only 17.1 cents pending a decision on the merits. The Commission nevertheless says that Jupiter must pay 18.5 cents to Phillips-Kerr now.

What is not clear is whether the Commission has held (1) that irrespective of how the Circuit Court of Cook

County rules on the merits of the contract dispute, Jupiter must pay 18.5 cents per Mcf to Phillips-Kerr, or (2) that *until* that court rules in Jupiter's favor, Jupiter must pay 18.5 cents to Phillips-Kerr.* Jupiter believes either ruling is wrong and unlawful, but for somewhat different reasons.

In the Union situation, Jupiter filed suit in the Federal District Court for the Northern District of Illinois and that court has stayed the action. Regarding Union, it is even less clear than in the Phillips-Kerr situation whether the Commission considers its order, that Jupiter collect only one cent for gas services, to be permanent or to hold only until the time the District Court rules.

Jupiter has shown that it has the right to pay Phillips-Kerr 17.1 cents and collect 3.4 cents from Union, that such rights exist *now,* and that the Commission cannot interfere with such rights until and unless the circuit court and Federal court rule against Jupiter. However, even if this Court were to reject that position, the only other holding available, in light of the Commission's orders and applicable law, is that Jupiter must pay Phillips-Kerr 18.5 cents per Mcf, and collect one cent from Union, *now,* but that the situation will change—irrespective of Commission orders up to this time—if one or both of the trial courts hold for Jupiter. Jupiter therefore urges that, if this Court does not rule that Jupiter has a present right to pay 17.1 cents to Phillips-Kerr and collect 3.4 cents from Union, and thus affirms the Commission Orders, it at least make clear that such affirmance is based upon the fact that the Commission's

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* The Commission's orders do not indicate that the Commission was issuing an "interim price decision" (and it did not even recognize the *Mobile* issue). Even if it were trying to set an "interim" price, however, it did not state its standards for setting such price and did not receive evidence or briefs on the point.

rulings are applicable only until decision of the contract actions now pending in Illinois.*

B. Even If The Commission's Ruling Is Only "Temporary," It Is Nevertheless Invalid

Even if the Commission has ruled that the prohibition against Jupiter paying less than 18.5 cents to Phillips-Kerr and collecting more than one cent from Union is operative *only* until Jupiter has won one or both of its Illinois contract actions, the Orders are invalid for several reasons.

The Commission orders expressly state that the Commission will not decide and has not decided the contract questions involved in the Illinois suits.** Having so ruled, the only appropriate action was for the Commission to preserve the status quo (as the Circuit Court of Cook County already had done by denying Phillips-Kerr's escrow motion)*** and have the parties look to that court for any desired relief, as the April 3 Order did. But in the December 13 Order, the Commission has ruled "for" Phillips-Kerr**** (but without deciding the issues and while purporting to defer to the state court on the issues) by ordering Jupiter to pay 18.5 cents, which is the Phillips-Kerr position, not 17.1 cents, as Jupiter contends. The

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* In this regard, it is relevant that Tennessee (Brief, pages 27-28) expressly takes the position that the Commission has held that it is because Jupiter has not (yet) won its Illinois contract actions that it has no right to pay Phillips-Kerr less than 18.5 cents or collect over one cent from Union, while the Commission (Brief, page 17) and Phillips-Kerr (Brief, pages 14 and 17, fn. 5) seem to agree.

** This was done most clearly in the April 3, 1968 Order (R. 3735-36, 3738), quoted at pages 15-16 of Jupiter's Initial Brief and repeated in part at page 11 of the Commission's Brief. The Commission, in its brief (page 17), acknowledges that its Orders do not limit the authority of the courts in Illinois over the contract disputes, and that the result of a court ruling for Jupiter "could be to reduce Jupiter's total payments to Phillips-Kerr-McGee."

*** See discussion above and Jupiter's Initial Brief, Section III A(3).

**** Temporarily, to use the premise of this subsection.

Commission, even had it chosen to set an "interim" price, should not have done so, but should have deferred to the Illinois court as a matter of comity which a Federal administrative agency owes to a state court of general jurisdiction. The Illinois court has undertaken, in an orderly fashion, to hear and determine this private dispute which can have no effect on the gas consuming public and about which the Commission has no special expertise and, indeed, as to which the Commission has recognized that it has no expertise.* And the court's order denying escrow is *res judicata* on the issue.**

In their Briefs, the Commission and its supporters try to direct attention away from the above error by claiming that Jupiter's contract arguments are weak, and that the trial courts will not (or should not) allow Jupiter to prevail.*** They attempt to buttress this conclusion by alleging that Jupiter's services, other than the transportation of gas, are minor. The short answer is that those arguments relate to the contract disputes which are in the courts, where the Commission itself left them, and

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* Phillips-Kerr and the Commission argue that the Circuit Court's ruling is not significant because Jupiter advanced "procedural" Illinois grounds against escrow. This is incorrect, however. The important fact is that it is the *court's* ruling, on whatever basis made, which should govern the parties pending completion of the litigation.

** Phillips-Kerr argue that *res judicata* does not apply to an order which is not appealable. However, under Illinois Supreme Court Rule 308, effective January, 1967, an escrow order *may* be appealed, in the discretion of the trial and appellate courts. (Ill. Rev. Stat., ch. 110A, §308). Furthermore, technical considerations aside, the courts have recognized that the function of collateral estoppel or *res judicata* is to prevent unnecessary and wasteful relitigation of issues, the basic test being whether there "is usually good sense for permitting [the issue] to be litigated again." *Lummus Co.* v. *Commonwealth Oil Refining Co.,* 297 F. 2d 80, 87 (2d Cir. 1961), *cert. denied,* 368 U.S. 986 (1962). No such good reason has been shown here.

*** The Commission in its Brief also suggests that, contrary to the concept that it has merely issued a "temporary" decision, it has really decided the contract issues. This suggestion is discussed in Section II. C (1), below.

since they are thus not before this Court for review, Jupiter does not propose to burden this Court with argument on those issues.*

The Commission and Phillips-Kerr are finally driven to their "filed rate doctrine" argument: that, in a 1965 order which has now become final, the Commission set a "filed rate" of 18.5 cents which Jupiter must pay Phillips-Kerr, without "setting off" its contractually due amounts. The answer is that the Commission did not set 18.5 cents in 1965, but it has tried to do so in at least one of the Orders here under review, even though it is legally prohibited from doing so. This is discussed in Section II. C (1) below. What is relevant in this subsection is that, even if 18.5 cents *were* the filed rate, the "no set off against filed rates" argument is absurd. The Commission in its Brief** inadvertently admits this when it states that the Illinois court could hold Phillips-Kerr "contractually bound to pay a certain amount for these [non-jurisdictional] services"

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* As to those issues, however, Jupiter would point out that they are, of course, not as simple or one sided as its opponents would like this Court to believe. Examination of the contracts with Phillips-Kerr and Union, each of which consists of over 60 pages, shows the defects in the Phillips-Kerr and Tennessee contract arguments. For example, the Commission Staff and Phillips-Kerr now argue that because the Jupiter, Phillips-Kerr contract provides for the handling of condensate "free of cost and expense to Phillips and Kerr-McGee," Jupiter's contract arguments must obviously fail. (Commission Brief, page 19, fn. 8, Phillips-Kerr Brief, pages 3, 11). In fact, however what that passage expresses, *in context*, is that no extra charge over and above the specified contract compensation of approximately 2.4 cents is to be applied, because the contract requires Jupiter to buy and resell gas, transport it, transport and otherwise handle condensate and perform other services, all for a single 2.4 cents compensation. But all that Jupiter seeks is to be allowed to retain that compensation (and pay the contract price to Phillips-Kerr) for the total bundle of services it performs; it does not seek any extra payment over the contractual amount, and the magnitude or alleged insignificance of the "non-gas services" it performs is, therefore, irrelevant.

** Commission Brief, page 17.

and the "*net* effect of such a situation could be to reduce Jupiter's total payments to Phillips-Kerr-McGee . . . ." This can only mean that the Commission recognizes that Jupiter can, after it receives a favorable court decision, set off what the Commission regards as the "non-jurisdictional charge" against the 18.5 cents. If so, why cannot Jupiter do it now, as long as the Illinois court sanctions it, as it has? Indeed, not only is it no more a violation of the "filed rate" doctrine now than it would be later, but, in addition, the Commission has deferred to the court on this issue, and should not be allowed to renege on that deferral by subterfuge. It is also relevant to note that Union is setting off amounts it contends Jupiter owes it against the one cent which even Union and the Commission concede Union owes Jupiter, and thus is paying Jupiter nothing. Jupiter denies any debt to Union, and contends the correct current charge is 3.4 cents, and not one cent. But if Union is upheld, *or until its position is rejected by the Federal court in Illinois,* Jupiter does not believe it has grounds to object to the set off.* And the Commission has not objected to *that* set off.

On the basis of the foregoing, the Commission's Orders herein are in error, *even* if they are construed to deny Jupiter the right to pay Phillips-Kerr less than 18.5 cents and collect more than one cent from Union *only until* the state and/or Federal courts in the litigation in Illinois rule in Jupiter's favor.

C. If The Commission's "Price" Ruling Is "Permanent," It Is Even More Clearly Invalid

If the Commission's Orders purport to be "permanent," they then cannot be based on the argument**

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* Unless the debt which Union alleges is owed it is extinguished by set off earlier.

** Made by the Commission (Brief, pages 16-18), Phillips-Kerr (Brief, pages 14-15) and Tennessee (Brief, pages 26-27).

that Jupiter cannot merely "assert" (rather than prevail in court upon) its contract position and then base its revenues and purchase price on that assertion. If the orders are permanent, such orders must then be based (1) upon a sub silencio prejudgment of the contract issues upon which the Commission has already purported to defer to the courts in Illinois (which prejudgment obviously would itself be clear error), or (2) upon a finding, or assumption, that *even if* the courts in Illinois uphold Jupiter's contract position, Jupiter cannot act in accordance with such position. Jupiter will show, in the two subsections below, that such latter position is also in error.

(1) The Commission has ordered a price for Phillips-Kerr which violates the Mobile doctrine

United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, *supra,* holds that, with one exception, a natural gas company cannot collect a price that is higher than that allowed by contract. The exception, set forth in *FPC* v. *Sierra Pacific Power Company,* 350 U.S. 348 (1956), is that, unless the Commission finds that the contract "rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service . . ., a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility."*

The Commission Brief (pages 18-19) does not dispute the force of *Mobile,* nor does it claim that the Commission made, or could make, a *Sierra* finding. Instead, it simply deals perfunctorily with the merits of the contract argument and claims Jupiter's case is weak and its non-jurisdictional services small. These false claims, which were discussed above, cannot be part of a rationale in support of a *permanent* Commission decision, since

* 350 U.S. at 355. See also Jupiter's Initial Brief, pages 21-24.

they will disappear if Jupiter wins its contract actions in the courts.

Thus, the Commission is forced to claim (Brief, pages 18-19) that in 1965, in Opinion No. 470, it decided the contract issues contrary to Jupiter's position, so that the presently ordered 18.5 cents is not above the contract and thus not invalid under *Mobile*. (See also Phillips-Kerr Brief, pages 18, 20). In the first place, this claim that the Commission has already decided the contract issues is contradictory to the Commission's express deferral to the trial courts on those issues (see Section II B, *supra*).*

Secondly, it is simply not true that the Commission decided the contract issues against Jupiter and ordered a flat 18.5 cents. In Opinion No. 470, a certificate case decision, the Commission did not consider the contracts at all and ordered that Phillips-Kerr's price to Jupiter "shall not be *more than* 18.5 cents per Mcf" and ordered Jupiter to charge Tennessee 2.4 cents more, or 20.9 cents.** Since the contract provides that Phillips-Kerr is to receive 2.4 cents per Mcf less than the price Jupiter collects, 18.5 cents was the contract price when Opinion 470 set 20.9 cents as Jupiter's price. Thus, 18.5 cents did not then violate *Mobile* and Jupiter was not injured thereby. Rather, Opinion 470 was strictly in accord with the holding of *Mobile* that contract provisions control as an upper price limit, since not only did Opinion 470 hold that Phillips-Kerr was to collect *not more than* 18.5 cents, but it also ruled that Phillips-Kerr could "secure only the in-line price (18.5 cents per Mcf) for the gas sold from the federal domain

* Thus, Phillips-Kerr's argument (Brief, page 17, fn. 5) that the Commission is *competent* to decide contract questions is irrelevant, even if it were true, since the Commission has not done so.

** 34 F.P.C. 486, at 490, ordering paragraphs (emphasis added).

*as limited by their contractual rights."** It was only when Jupiter's sale price to Tennessee was reduced to 19.5 cents (by decision issued June 28, 1966) that the 18.5 cents price became higher than allowed by the contract (because it is only one cent, not 2.4 cents, less than 19.5 cents), which contract is also the Phillips-Kerr rate schedule (filed rate).**

The Commission and Phillips-Kerr, however, simply ignore the operative language of Opinion 470.*** But they are uneasy with that approach—indeed, Phillips-Kerr (Brief, page 5) recognizes that Opinion 470 left Jupiter's contractual spread intact (so that no contract issue was then raised)—and thus are driven to the claim that Jupiter conceded, in its rate case settlement offers in 1966, that Phillips-Kerr had a right to 18.5 cents (Commission Brief, page 15; Phillips-Kerr Brief, page 7). Apart from its inaccuracy, there is a simple answer to that claim. Prior to the Commission approval of the 19.5 cents rate for Jupiter, when Jupiter made its settlement offers, Phillips-Kerr *did* have a contract right to 18.5 cents, because that price didn't violate the contract, but following such approval, it no longer had such right.

The Commission and its supporters finally claim that Jupiter's 1966 rate settlement (35 F.P.C. 1091, R. 3405) decided the contract issues against Jupiter, and thus

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* 34 F.P.C. at 488 (emphasis added).

** The Commission's brief (page 15) says that there has been no filing to change Phillips-Kerr's rate from 18.5 cents to 17.1 cents, and implies that this means 17.1 cents is invalid. This is nonsense. Of course Phillips-Kerr hasn't filed for a decrease, particularly with the Commission claiming it need not, but this can't provide a basis for saying that they can keep, or get, the higher rate, even if it is above the contract rate, thus profiting (at Jupiter's expense) by their own intransigence and the Commission's error.

*** They persist in quoting only a reference to "18.5¢" at 34 F.P.C. 489, which is bracketed by the two precise references, quoted above, including the ordering clause.

rendered *Mobile* inapplicable. This is untrue. That order set Jupiter's rate for transporting *gas* for Union at one cent per Mcf and set Jupiter's price to Tennessee at 19.5 cents, but it did not fix the Phillips-Kerr price at all, much less at 18.5 cents. And, as admitted by the Commission (Brief, pages 7-9), Phillips-Kerr (Brief, pages 7-8) and Tennessee (Brief, pages 8-11), Jupiter consistently reserved its right to extra compensation for non-jurisdictional service.* The Commission did not hold that Jupiter had such right, but neither did it state it did not. Rather, the Commission simply reserved judgment on such issue, specifically stating that it was "not now determining the claimed rights of any party" on the question of compensation for the additional services and that its order "neither implies that further contractual arrangements are open for renegotiation nor requires that further negotiations be held."** Re-enforcing this conclusion that the order approving Jupiter's settlement proposal applied only to natural gas services is the specific recognition of this in the April 3, 1968 Order:

> "As indicated above, this settlement [Jupiter's] applied only to the transportation of *gas* to be delivered to Tennessee."***

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* R. 3345-46, 3371-73. Jupiter offered to accept less than its full contract compensation to which it has a right, as parties always do when seeking a compromise solution to avoid litigation, with the attendant time, expense and uncertainty. And Jupiter sought to obtain Phillips-Kerr and Union agreement or Commission approval of a "charge for the non-jurisdictional service," for the same reasons. But having failed to achieve either goal, Jupiter chose the only other societally acceptable method of re-establishing and achieving its contract rights; it reserved its rights and went to court—only to now find the Commission attempting to interfere, even though the litigation relates to matters beyond its jurisdiction, by the Commission's own admission.

** 36 F.P.C. at 495-96, R. 3430. This ruling was made in response to Phillips-Kerr's application for rehearing (R. 3418). See also 35 F.P.C. at 1094, R. 3409.

*** Mimeo, page 9, fn. 8, R. 3736 (emphasis added).

Finally, it is claimed that the April 3, May 24, and December 13, 1968 Orders here under review fix an 18.5 cent price for Phillips-Kerr, and thus decided the contract issues. This, too, is false. First, as discussed above, the Commission explicitly deferred to the trial courts on the contract question. Second, the Commission did not even recognize, let alone consider or decide, the *Mobile* contract issue. The Commission cannot now avoid *Mobile* by using its Brief to this Court to fill in the matters which the Commission didn't deal with when the case was before it.

(2) The Commission's Orders violate the Commission's authority and jurisdiction.

In addition to the violation of *Mobile* (with regard to the Jupiter, Phillips-Kerr dispute), the Orders here under review violate the Commission's jurisdictional authority. (See Jupiter's Initial Brief, pages 12-17). As noted above, the Commission has recognized that Jupiter performs non-jurisdictional services for both Phillips-Kerr and Union* and has left it to the courts to decide the compensation that Jupiter is entitled to collect for those services. But the Commission has also held that Jupiter must forego those non-jurisdictional revenues. This is error because, by definition, the Commission has no authority over such revenues. In short, the Commission exhausted not only its jurisdiction but also its legitimate area of concern when it clearly established (1) that the pipeline purchaser of the gas, Tennessee, and thus the consumer, is paying no more than the Commission's established price; (2) that the rates for *jurisdictional* services by Jupiter and Phillips-Kerr are established clearly; and (3) that any controversy between the parties relative to matters outside

* R. 3735-36, 3738 (Order of April 3), 3822-23 (Order of May 24) and 3870 (Order of December 13).

the jurisdiction of the Commission is in the hands of a court of competent jurisdiction. Therefore, there is no public interest issue involved and the Commission has neither jurisdiction nor legitimate reason to interfere with Jupiter's "non-jurisdictional" revenues.

There is no answer to the above Commission violations of its power. Nor do the Commission and its supporters anywhere attempt to answer the point that if Jupiter's contract position is upheld, and its right to compensation in excess of one cent per Mcf* reaffirmed by either or both of the trial courts in Illinois, then the Orders here under review—if they purport to be permanent orders, applicable beyond the time of the court decisions—are invalid as attempts to regulate the amount that Jupiter can charge "for non-jurisdictional services."**

Thus, the Commission and its supporters finally claim that the Commission should be allowed to regulate non-jurisdictional charges because it "needs" to do so in order to regulate Jupiter's "spread" (Phillips-Kerr Brief, page 18); and that if Jupiter succeeds in upsetting the orders here under review, it "might frustrate the 1966 rate settlement" (Tennessee Brief, page 28). The answer to these arguments is simple. In the Phillips-Kerr situation, there is no "need" to regulate Jupiter's

* As Jupiter stated in its Initial Brief (page 14), it believes it has a single unified contract which allows it to retain a single "spread" (Phillips-Kerr) or charge (Union), which well exceeds one cent, and such spread and charge is recompense for both jurisdictional and non-jurisdictional services. Thus, Tennessee's claim (Brief, pages 18-19, 23-25) that Jupiter's contracts do not state a separate charge for non-jurisdictional services is correct, but their conclusion that this means that no more than one cent can now be collected is not.

** As shown in Section II. B (1) above, Jupiter's settlement only related to jurisdictional services and Jupiter reserved its rights as to non-jurisdictional services.

"spread" because the only thing that affects Tennessee and its customers and the gas consuming public is the 19.5 cents Jupiter price to Tennessee,* and that price will not be increased if Jupiter is allowed to retain a 2.4 cent "spread" and pay Phillips-Kerr 17.1 cents as provided by contract. Leaving the parties to their bargain is consistent with the intent of Congress (in passing the Natural Gas Act) that the sale price for gas be set initially by the parties, to be modified only to benefit the consumers of natural gas. Where has the Commission found that it is necessary, *to protect the consumers of natural gas,* that Jupiter have its lawfully due payments diverted to Phillips-Kerr, and pay Phillips-Kerr the *higher* price of 18.5 cents? Where has the Commission found that the 17.1 cent Phillips-Kerr contract price is unjust, unreasonable, unduly discriminatory or preferential? Where has the Commission found that the 17.1 cent price will injure the public by impeding Phillips-Kerr's ability to render service? It is apparent that the Commission has not made, and could not make, these findings, which are an absolute prerequisite to upsetting the contract price under the *Sierra* doctrine. It is further apparent that because of the absence of such findings the Commission's Orders cannot stand.

As to Tennessee's argument, if Jupiter succeeds in its appeals here, Union will still collect only about 18.75 cents from Tennessee (as ordered by the Commission), and will be required to fulfill its contractual obligation

* If the Commission's already issued order in other proceedings, reducing the "area price" for gas, is made effective Jupiter will reduce its price to Tennessee, since it merely desires to hold Phillips-Kerr to the bargain the parties have made, that is, for Jupiter to receive about 2.4 cents per Mcf. When the contract was made, Phillips-Kerr was receiving 3.8 cents, but its price then escalated to 18.9 cents, before the Commission's action cut it back to about 17.1 cents. Jupiter thinks it not inequitable that it be allowed to collect its 2.4 cents.

by paying 3.4 cents to Jupiter pending decision by the District Court in Illinois, so that there will be no effect on the public. Tennessee's argument that this would frustrate the 1966 settlement is erroneous in view of the Commission's own recognition that that settlement "applied only to the transportation of gas to be delivered to Tennessee" (R. 3736) and its recognition in the subject Orders that Jupiter performs additional non-jurisdictional services, the charge for which is properly for the courts to decide.

III. THE COMMISSION'S DECEMBER 13, 1968 ORDER IS INVALID ON ADDITIONAL GROUNDS

The December 13 Order has certain unique infirmities, since it is clear that:

(1) The December 13 Order required a refund of more than $700,000 to Phillips-Kerr for the past, while the earlier Orders did not.

(2) The December 13 Order required Tennessee to pay Phillips-Kerr, rather than Jupiter, while the earlier Orders did not.

These additional requirements render the December 13 Order invalid under Section 19(a) of the Natural Gas Act, because they were modifications of the April 3 and May 24 Orders, after the record on appeal of those Orders had been filed in this Court. Staff and Phillips-Kerr admit that the second of the above provisions was new, but contend that it was not a "modification" of the earlier Orders.* And both parties fail to even mention the refund provision of the December 13 Order (point (1), above). Thus, Staff and Phillips-Kerr ignore one modification and seem to be arguing that even though the Commission ordered a complete change in the method of contractual payments, this was an "additional" re-

* Staff Brief, pages 22-23; Phillips-Kerr, pages 23-25.

quirement which otherwise did not change any provision of the earlier Orders and therefore did not "modify" those Orders. This attempt fails because any change, whether an addition to or a deletion from an Order, is a modification. The December 13 Order clearly modified the earlier Orders and thus must fail under the express provisions of Section 19(a).*

Furthermore, the December 13 Order is also invalid because the requirement that Tennessee pay Phillips-Kerr, rather than Jupiter, for the natural gas purchased from Jupiter invalidly "reforms"** the Jupiter-Tennessee contracts. That action exceeds the Commission's power in several respects. First, it violates the filed-rate doctrine. Under the Natural Gas Act, the underlying contract is filed with the Commission as the company's rate schedule. That is, the contract, once accepted by the Commission, *is* the rate schedule. Thus, any ordered deviation from the contract necessarily violates the rate schedule, and if

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* See Jupiter's Initial Brief, Section III. D). *Dyer* v. *SEC*, 289 F. 2d 242 (8th Cir. 1961), relied upon by both Staff and Phillips-Kerr, is not in point. The only question there was the effect of an order which was being appealed upon subsequent and entirely separate proceedings. There had been no modification of the order which was being appealed after the record on appeal had been filed.

Also, Phillips-Kerr still attempt (see Phillips-Kerr Brief, page 24) to justify the Commission's December 13 Order on the ground that Jupiter had "flouted" the earlier Orders. But this purported rationale must fail on two counts. First, it is factually incorrect. See "Reply of The Jupiter Corporation to Answers to Jupiter's Motion for Stay Pending Appeal" in this Court, dated January 15, 1969, at pages 6-9. Second, even if it were factually correct, the rationale would not justify a violation of Section 19(a), although it might have justified resort to a district court under Section 20. Certainly, a "modification" within the meaning of Section 19(a) is still a "modification," whether or not the Commission believed that Jupiter was acting in bad faith.

** Both Staff (Brief, page 20) and Phillips-Kerr (Brief, page 29) argue that the Order does not "reform" the contract. The price term and method of payment are, of course, among the most important terms of a contract. Any argument that a change in those terms does not "reform" the contract is pure semantics and, in any event, irrelevant to the substantive issues raised by Jupiter.

such a change is made other than as provided in Sections 4 or 5 of the Act, the change violates the filed rate doctrine. As applied to the facts here, the Commission's attempt to modify the Jupiter-Tennessee contract (Jupiter's rate schedule), by changing the manner of payment, is a violation of the filed rate doctrine. And contrary to the categorical statement by Phillips-Kerr,* the Commission has recognized that the filed rate doctrine applies to it:

> "We are not aware of, nor have we been cited to, any authority which would permit us to peremptorily modify a filed tariff . . ."**

The December 13 reformation order, being equivalent to attachment or garnishment, is also invalid as an assumption by the Commission of judicial power.*** Both the Commission and Phillips-Kerr rely on general Section 16 of the Natural Gas Act to justify the attempt to change contractual relationships and to fashion an administrative self help remedy, rather than use the enforcement procedures provided in Section 20 of the Act. Section 16, of course, is a significant provision. The cases cited by the Commission and Phillips-Kerr**** show that Section 16 grants the Commission power to adopt general orders and impose reasonable conditions on certificates,***** but they do not support a construction of Section 16 which would expand the Commission's jurisdiction

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* Phillips-Kerr Brief, page 29: "moreover, the filed rate doctrine . . . has never been applied as a bar to action by the Government."

** *Alabama-Tennessee Natural Gas Co.*, Docket No. RP69-15, issued January 17, 1969 (mimeo, page 2).

*** See Commissioner Carver's dissent from the December 13 Order and Jupiter's Initial Brief, pages 27-28.

**** Commission Brief, page 25; Phillips-Kerr Brief, pages 25-27.

***** *Niagara Mohawk Power Co.* v. *FPC*, 379 F. 2d 153 (D.C. Cir. 1967), so heavily relied upon by Staff and Phillips-Kerr, merely upheld the Commission's power to attach a condition to a license issued under the Federal Power Act in order to effectuate a specific statutory directive under Section 10 of that Act relating to recovery of excess earnings.

and justify the Commission arrogating to itself the powers of a court of law. In fact, it is established that Section 16 does not expand the power granted the Commission, or nullify restrictions imposed, under other sections of the Act.*

IV. THE COMMISSION'S ASSERTION OF JURISDICTION TO SET RATES FOR THE TRANSPORTATION OF LIQUID CONDENSATE EXCEEDS THE AUTHORITY CONFERRED BY THE NATURAL GAS ACT

Tennessee suggests (Brief, page 18, fn. 17) that the Commission's finding that it has jurisdiction to regulate the rate which Jupiter can charge for the transportation of liquid condensate is dictum, in that such finding did not provide, or even relate to, the Commission's rationale for increasing the Phillips-Kerr price and decreasing Jupiter's revenues from Union. Thus, Tennessee claims that the finding as to condensate does not now aggrieve Jupiter and is not ripe for review. The Commission disagrees (Brief, pages 31-32). Jupiter believes that Tennessee is correct, because the Commission seems to believe that it can increase the Phillips-Kerr purchase price to Jupiter, and decrease Jupiter's revenues, even though Jupiter performs admittedly non-jurisdictional services (in addition to condensate transportation). The classification of con-

* See cases cited at page 21 of "Reply of The Jupiter Corporation to Answer to Jupiter's Motion for Stay Pending Appeal."

Also, in *FPC* v. *Metropolitan Edison Co.,* 304 U.S. 375, 386 (1938), the Supreme Court held that the Commission has no authority to enforce its directions, save by application to a Federal court, and that a party is entitled to the judgment of a court before obedience can be compelled. See also *United Gas Pipe Line Co.* v. *FPC,* 181 F. 2d 796 (D.C. Cir.), *cert. denied* 340 U.S. 827 (1950); *Mississippi Power & Light Co.* v. *FPC,* 131 F. 2d 148 (5th Cir. 1942). If the Natural Gas Act were construed to give the Commission enforcement power, without recourse to judicial enforcement, grave constitutional questions would be raised. See *NLRB* v. *Jones & Laughlin Steel Corp.,* 301 U.S. 1, 46, 47 (1937) and *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 48 (1938).

densate transportation as jurisdictional does not affect this result, so that it appears that the assertion of jurisdiction over condensate rates will only injure Jupiter if the courts in the Illinois cases set a separate price for condensate transportation, and the Commission *then* orders such price reduced by assertion of its alleged jurisdiction. However, Jupiter will here reply to the Commission's arguments on this issue, in the event that this Court rules the issue is now appealable.

Two facts must be recognized. First, only natural gas is covered by the Natural Gas Act, liquid condensate is not natural gas, and no one argues to the contrary.* Second, the Commission did not, as it claims (Brief, pages 31-39), *merely* assert jurisdiction over the combined stream of natural gas and liquid condensate transported by Jupiter; it asserted jurisdiction to determine the fair and reasonable *rates* which Jupiter may charge for the transportation of condensate (R. 3735). This distinction as to what the Commission actually did is essential to this Court's decision in this case, because the Commission attempts to delude this Court into believing that the issue raised has already been decided and that precedent justifies, indeed requires, a summary affirmance of the Commission's attempt. That is incorrect.

Jupiter does *not* challenge the Commission's *certificate* jurisdiction over the facilities used for transporting a combined stream of natural gas and liquid condensate, which is all that was upheld in *Panhandle Eastern Pipe Line Co.* v. *FPC,* 359 F. 2d 675 (8th Cir. 1966). And Jupiter does *not* challenge the Commission's jurisdiction, in a proceeding to set the rates for either transporting or selling natural *gas,* to take into account the

* The Commission and its supporters discuss the fact that condensate can be gasified and ignore the fact that its normal status is as a liquid, but stop short of claiming it is "natural gas."

revenues obtained from liquid condensate, either as a credit against the expenses for transporting natural gas or by allocating out of the cost of service applicable to the transportation of natural gas the portion of total costs applicable to the transportation of condensate (this was all that was upheld in the *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968),* and what is proposed by the Commission itself in general policy Docket No. R-338).

What Jupiter *does* challenge in these appeals is the far different Commission action involved here: the Commission's assertion of jurisdiction to set the rates which Jupiter may charge for transporting liquid condensate. It is one thing for the Commission to take the revenues from such non-jurisdictional transportation into account in setting jurisdictional rates; it is quite another for the Commission to try to fix those non-jurisdictional revenues.

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* The Commission, in *Permian,* had not tried to fix or evaluate rates for either selling or transporting liquid condensate. See quotation at pages 34-35 of the Commission Brief. And the jurisdiction over "casinghead" gas (which is simply gas which is produced with oil) was asserted *after* the condensate was separated.

The Commission (Brief, pages 34-35) also relies heavily on *Deep South Oil Co.* v. *FPC,* 247 F. 2d 882 (5th Cir. 1957), *cert. denied,* 335 U.S. 930 (1958). But, as Jupiter has shown (Initial Brief, pages 42-43), the condensate had been removed prior to the point at which the Commission exercised its jurisdiction so that there was no issue before the Commission of jurisdiction over condensate, and, hence, the Fifth Circuit did not rule on that issue. And the Commission did not assert jurisdiction over the separate contract covering condensate. The Commission's continued reliance (Brief, pages 38-39) on *Louisiana Public Service Comm'n* v. *FPC,* 359 F. 2d 525 (5th Cir.), *cert. denied,* 385 U.S. 833 (1966), and the other "commingling" cases is also misplaced, since none of the cases relied on by the Commission involved a product other than natural gas. (Initial Brief, pages 43-44) Further, as the Commission itself has recognized, not even every transaction which involves the commingling of gas supports an assertion of Commission jurisdiction. See *Secretary of the Army,* Docket No. CP66-69, issued Nov. 25, 1968 (mimeo).

Aside from its action in this case, the Commission has never asserted jurisdiction to regulate the rate for either the transportation *or* sale of liquid condensate. To the contrary, the Commission has consistently recognized that it has no such jurisdiction.* Now the Commission is trying to regulate the condensate transportation rate (only as to Jupiter), but not the sale price (as to anyone). Compare *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954).** It is clear that neither type of regulation is necessary to protect the natural gas consumer. And, for that reason, the Commission has not even tried to gain jurisdiction over the price at which liquids are sold (even though the subject is of importance),*** because the Commission knows that condensate does not affect the consumers of *gas,* as long as costs are properly allocated between gas and liquids, or the liquid revenues credited. Since regulation of the level of liquid *sales* revenues is not useful, *a fortiori* the much lesser amount of money involved in *transportation* of liquids is even more clearly not subject to regulation.

The Commission is treating Jupiter differently than it treats all other natural gas companies,**** since it asserts jurisdiction to determine the fair and reasonable compensation to Jupiter for transportation of condensate: exactly what it proposed *not* to do in R-338. The Commission's Brief says the policy of R-338 is only "tentative"; but that begs the question, for the Commission

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* See cases cited by Jupiter in its Initial Brief page 35. And the Commission's own Staff recognized this fact earlier in these proceedings (R. 393-398).

** See Jupiter's Initial Brief, pages 40-42.

*** Certainly the subject is of importance. In 1962, there were approximately 100 million barrels of liquid condensate marketed (see *Area Rate Proceeding, Southern Louisiana Area,* AR61-2, Presiding Examiner's Initial Decision, issued December 30, 1966, page 50 (mimeo)), and at approximately $3.00 per barrel (See *Area Rate Proceeding, Permian Basin Area,* 34 F.P.C. 159, 196 (1965)) this amounts to over three hundred million dollars a year.

**** See Jupiter's Initial Brief, pages 36-39.

has followed its proposed policy in every other case, *both before and after* the April 3 Order here under review.* The Commission has never discussed why it has chosen to treat Jupiter differently from all other companies which have appeared before it in all similar situations and inconsistently with the general policy proposed by the Commission. But the Commission claims that:

> "even if it were assumed that complete protection could be afforded the consumer without rate jurisdiction (an assumption subject to some doubt), no protection could be afforded the party for whom the condensate portion of the gas stream was transported without such jurisdiction. The Act plainly envisions protection of all such parties."**

The fact that someone on the Commission's Staff has some unexplained "doubt" that consumers can be protected without direct rate regulation of transportation of liquid condensate can hardly justify discrimination and violation of jurisdiction, and the Commission itself has never expressed any such "doubt", particularly since it wrote directly to the contrary in Docket R-338. As to the contention that protection of Phillips-Kerr and Union (the parties for whom condensate is transported) is a proper goal under the Natural Gas Act, the governing rule was laid down by the Supreme Court in *FPC* v. *Sierra Pacific Power Co., supra.* The Commission has *never* made, or even purported to make, *any* finding in these proceedings that, pursuant to *Sierra Pacific,* the public interest requires protection of Phillips-Kerr or Union in order to allow them to continue service. Jupiter does not think that any such finding could be supported by the record,*** but the important fact is that none was made.

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* See the cases cited by Jupiter in its Initial Brief, pages 37-38.

** Commission Brief, page 39, footnote 19.

*** See "Reply of the Jupiter Corporation to Answers to Jupiter's Motion for Stay Pending Appeal," pages 9, 11.

CONCLUSION

The Commission's Orders here under review should be reversed.

Respectfully submitted,

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March 3, 1969

BRIEF FOR INTERVENORS
PHILLIPS PETROLEUM COMPANY AND
KERR-McGEE CORPORATION

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22154

THE JUPITER CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*,
PHILLIPS PETROLEUM COMPANY, KERR-McGEE CORPORATION, ET AL., *Intervenors*.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

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ON PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

**BRIEF FOR INTERVENORS
PHILLIPS PETROLEUM COMPANY AND
KERR-McGEE CORPORATION**

STATEMENT OF ISSUES

1. Whether the Federal Power Commission erred in reaffirming prior Orders specifying the rate to be paid by petitioner for natural gas and in refusing to permit any set-off from that rate for compensation which petitioner asserts is due it from the natural-gas seller for certain very limited services performed by petitioner.

2. Whether the Federal Power Commission erred in entering an Order designed to insure compliance with other Orders on review in this Court which had not been stayed by the Commission or by this Court but with which petitioner refused to comply.

STATEMENT OF THE CASE

At issue in this case is the validity of rate orders issued by the Commission which reaffirm prior Commission Orders specifying the appropriate rate to be paid by petitioner ("Jupiter") to intervenors Phillips Petroleum Company and Kerr-McGee Corporation ("Phillips-Kerr-McGee") for natural gas purchased by Jupiter and then resold to intervenor Tennessee Gas Pipeline Company ("Tennessee"). These prior Orders, issued in 1965 and 1966, requiring Jupiter to pay Phillips-Kerr-McGee 18.5¢ per Mcf and to charge Tennessee no more than 19.5¢ per Mcf, had been thought by the Commission to have concluded what even then constituted a long history of the Commission's efforts to regulate the "spread" between Jupiter's purchase and sale prices. (R. 3728). That history has since been made even more extensive as a consequence of Jupiter's failure to comply with the prior Orders, one of which was entered at its instance. The Orders now before this Court represent the Commission's efforts finally to resolve this matter.

The contractual arrangements

Phillips and Kerr-McGee are joint owners of leases on gas-producing properties in the Rollover Field, an area located in the Gulf of Mexico, off the shore of Louisiana. Pursuant to contracts entered into in 1953, and since amended, Phillips-Kerr-McGee sell to Jupiter

gas produced by them in this Field, and Jupiter transports the gas to shore and there resells it to Tennessee. (R. 1422). Under the contract with Phillips-Kerr-McGee, Jupiter also transports to shore "the condensate produced with such gas," mechanically separates the condensate from the gas, and delivers the condensate to Phillips-Kerr-McGee. (R. 1433-34).

This contract provides specifically that Jupiter's transportation, separation, and delivery of the condensate to Phillips-Kerr-McGee shall be "free of cost and expense to Phillips and Kerr-McGee." (R. 1434). Jupiter's compensation for all of its activities, therefore, is the difference between the amount it obtains on resale of the gas to Tennessee and the amount it pays for the gas to Phillips-Kerr-McGee.[1]

The amount to be paid by Jupiter, under its contract with Phillips-Kerr-McGee, is described as the "applicable price" minus an adjustment specified in the contract which varies depending on the amount of gas purchased by Jupiter. (R. 1441-44). The "applicable price" is the price which Tennessee agrees to pay Jupiter, under Tennessee's contract with it, for the gas "regardless of whether or not such price is actually paid" (R. 1442), or any higher price which Jupiter may receive. (R. 1480).

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[1] Under a separate contract entered into with Phillips (not Phillips-Kerr-McGee), Jupiter receives some additional compensation. This contract provides that, on-shore, at a point prior to delivery of the gas to Tennessee but subsequent to the separation of the condensate, Phillips is to extract liquefiable hydrocarbons from Jupiter's gas, market these hydrocarbons, and pay Jupiter 30% of the proceeds. No issue is presented as to the obligations of the parties under this contract.

As for the adjustment, an amendment to the basic contract specified the contractual rights of the parties if for any reason Jupiter was required to reduce the adjustment amount specified in the contract. (R. 1480-81). In that event, according to the amendment the impact of the reduction is to be felt only by Jupiter, and Phillips-Kerr-McGee are not to be adversely affected. Indeed, if the amount of the adjustment is required to be reduced, the contractual arrangement is that the price payable by Jupiter to Phillips-Kerr-McGee would increase by the amount of the reduction in the adjustment, "to the end that Phillips and Kerr-McGee will receive for gas . . . the applicable price per Mcf less only the amount per Mcf to which [the adjustment] . . . is reduced . . . ." (R. 1481).

There is no dispute that, prior to the issuance of the Commission Orders to be discussed below, the "applicable price," as well as the price actually received by Jupiter from Tennessee, was 21.3333¢ per Mcf (exclusive of taxes) and the adjustment was 2.4¢ per Mcf, so that Jupiter was contractually obligated to pay Phillips-Kerr-McGee 18.9333¢ per Mcf. (R. 1501).

The prior Commission Orders

In Opinion No. 470, *Phillips Petroleum Co.*, 34 F.P.C. 486 (1965), the Commission ordered the issuance to Phillips-Kerr-McGee of certificates of public convenience and necessity, under Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing their sale of natural gas to Jupiter. An Ordering paragraph provided, in a pro forma manner, that the price "shall not be more than 18.5 cents per Mcf . . . ." 34 F.P.C. at 490. At that time, however, it was recog-

nized by Jupiter, in direct contrast with its current position, that that Order established an 18.5¢ per Mcf price to be paid by Jupiter and that this price was lower than the contract price. As Jupiter stated in its Petition for Rehearing of that Order (p. 1):

> "In basic summary, the Commission, in Opinion No. 470, ruled:
>
> "1. That effective as of July 23, 1964, the 'in-line' certificate price to be collected by Phillips Petroleum Company and Kerr-McGee Oil Industries, Inc. (Phillips-Kerr) for gas produced by them in the Rollover Field, Louisiana, is 18.5¢ per Mcf (as compared to the 18.9333¢ net per Mcf basic gas revenues it has been collecting), and that Jupiter's gathering charge is to be in addition to the 18.5¢, rather than paid out of such Phillips-Kerr revenues."

This was also acknowledged in Jupiter's Petition for Review of Opinion No. 470, where it stated explicitly:

> "In Opinion No. 470, the Commission ruled that Phillips-Kerr should collect a price of 18.5¢ per Mcf, the 'in-line area certificate price' established for gas produced in offshore lands situated in the federal domain." (*The Jupiter Corp.* v. *FPC,* 7th Cir., No. 15469, Petition for Review, p. 4).

In addition to establishing this 18.5¢ per Mcf price, Opinion No. 470 also reduced Jupiter's resale price to Tennessee to 20.9¢ per Mcf, so that Jupiter's "spread" remained 2.4¢ per Mcf, as specified in the contract. *See* 34 F.P.C. at 489.

The appeal from Opinion No. 470 was taken by Jupiter because of the possible impact of that Opinion on another then-pending proceeding in which the Com-

mission was concerned with the reasonableness of this 2.4¢ per Mcf contractual "spread." The court action was dismissed on Jupiter's motion as part of a Jupiter offer of settlement in that proceeding which reduced that "spread" to 1¢ per Mcf.

That proceeding was instituted by the Commission in December 1962 under Section 5 of the Act, 15 U.S.C. § 717d, for an investigation of the rate at which Jupiter resold to Tennessee the gas it purchased from Phillips-Kerr-McGee. After numerous efforts by Jupiter to abort and delay the proceeding, including the institution of two district-court injunction actions, *see* 35 F.P.C. at 1096-98 (R. 3128-32), an Initial Decision by a Commission Hearing Examiner was issued on January 5, 1966. 35 F.P.C. 1095. (R. 3126). The Examiner found that a "spread" of .632¢ per Mcf—as compared to the 2.4¢ per Mcf Jupiter was then enjoying—would be reasonable and ordered the "spread" reduced to the former amount. *See* 35 F.P.C. at 1092. (R. 3406).

During the course of the proceeding before the Examiner, Jupiter had argued that any reduction in the amount it received from Tennessee would have no effect on it because, as it read its contracts, any such reduction would operate to reduce Jupiter's payments to Phillips-Kerr-McGee by the same amount. This argument was rejected by the Examiner. 35 F.P.C. at 1120-22. (R. 3167-70). After an analysis of the contract between Phillips-Kerr-McGee and Jupiter, the Examiner determined that "the producer's [*i.e.,* Phillips-Kerr-McGee] sale price remains unaffected by this order and by the reduction in Jupiter's sale price to Tennessee." 35 F.P.C. at 1122. (R. 3169).

The Examiner's Order never went into effect because the Commission accepted a settlement offer proposed by Jupiter. Jupiter originally proposed to reduce its "spread" to 1.25¢ per Mcf (*i.e.,* to charge Tennessee 19.75¢ per Mcf). It went on to suggest that

> "an equitable resolution of this case requires either a reformation of its . . . contract with the Rollover Field producers (. . . Phillips and Kerr-McGee) to require those producers to pay Jupiter, or Commission permission for Jupiter to retain, charges for the gathering of natural gas, and for the services Jupiter renders in gathering, separating and storing those producers' condensate and other liquids." (R. 3338).

Jupiter proposed specifically that "while Phillips-Kerr-McGee shall be permitted under the contract to bill Jupiter for gas sold at a price of 18.5 cents per Mcf, Jupiter may credit against that charge an amount of 0.25 cents per Mcf for the service of gathering and separating Phillips-Kerr-McGee's condensate." (R. 3346-47).

This offer of settlement was superseded by an Amended Offer of Settlement, which was accepted by the Commission by Order of June 28, 1966. 35 F.P.C. 1091. (R. 3405). This Order reduced Jupiter's price to Tennessee to 19.5¢ per Mcf, limiting Jupiter to a "spread" of 1¢ per Mcf. As for any additional compensation for Jupiter's services with respect to condensate, the Commission stated that "any contractual arrangements Jupiter makes with the producers for those services will be acted upon if and when they are appropriately submitted to this Commission." 35 F.P.C. at 1094. (R. 3409). No party sought judicial review of this Order of June 28, 1966.

The Commission thus recognized that further contractual arrangements between Phillips-Kerr-McGee and Jupiter would be necessary in order for Jupiter to be entitled to any additional compensation and asserted that any such arrangements would require Commission approval.

The Cook County litigation

From June 1966 through May 1967, Jupiter recognized that it was limited to a "spread" of 1¢ per Mcf. During this period it received payments from Tennessee at the 19.5¢ per Mcf rate set in the June 1966 Order and paid Phillips-Kerr-McGee at the 18.5¢ per Mcf rate set in Opinion No. 470. Since May 1967, however, Jupiter has taken the position that despite these Orders it is still entitled to a 2.4¢ per Mcf "spread" and is required to pay Phillips-Kerr-McGee only 17.1¢ per Mcf. In August 1967 it filed suit against Phillips-Kerr-McGee under this theory in the Circuit Court of Cook County, State of Illinois.

That case is still pending. The Cook County Circuit Court denied without opinion a motion filed by Phillips-Kerr-McGee to dismiss on the ground that the matter was within the primary jurisdiction of the Commission. Phillips-Kerr-McGee also moved that Jupiter be required to deposit the disputed amount (1.4¢ per Mcf) in escrow, and Jupiter opposed the motion, claiming that no authority existed under Illinois law for the proposed escrow account. (A copy of Jupiter's Opposition to Phillips-Kerr-McGee's escrow motion is reprinted as an Appendix hereto). The Cook County Circuit Court denied this motion, also without opinion, on February 23, 1968.

The current Commission Orders

On August 30, 1967, Phillips-Kerr-McGee had filed with the Commission a "Petition . . . for Order Directing the Jupiter Corporation to Pay the Filed Rate for Purchased Gas" (R. 3544), in which the Commission was informed of Jupiter's failure and refusal to pay the 18.5¢ per Mcf rate ordered by the Commission. The Commission acted on the petition in its Order of April 3, 1968 (R. 3728), in which it reviewed the history of the proceeding, the dispute between Jupiter and Phillips-Kerr-McGee as to whether Jupiter was contractually entitled to any compensation for its services with respect to the condensate, and the Cook County litigation, and concluded in Ordering paragraph (C) (R. 3739):

> "(C) Jupiter is, and since August 11, 1965, has been, obligated to pay Phillips-Kerr-McGee the latters' prescribed certificate rate of 18.5¢ per Mcf under Phillips' FPC Gas Rate Schedule No. 329 and Kerr-McGee's FPC Gas Rate Schedule No. 56, respectively."

This conclusion was repeated in the body of the Order (R. 3734):

> "We believe it beyond dispute that, pursuant to the final orders of this Commission in Opinion No. 470 and approving the Jupiter settlement, . . . Jupiter must pay Phillips-Kerr-McGee 18.5 cents . . . for each Mcf of natural gas it purchases from those producers . . . ."

Jupiter applied for rehearing of the April 3 Order, and the Commission denied the application in its Order of May 24, 1968. (R. 3821). In this Order the Commission stated again (R. 3821-22) that Jupiter "is

bound . . . to restrict itself to a margin of 1¢ per Mcf on the gas which it purchases from Phillips-Kerr-McGee and sells to Tennessee." With regard to Jupiter's argument that it is entitled to offset from the 18.5¢ per Mcf rate an amount (1.4¢ per Mcf) greater than that (1¢ per Mcf) specified in the June 1966 Order to be applicable to its purchase and resale of gas, the Commission noted that Jupiter's "major function" was the transportation of gas and that "the vast bulk (if not all) of the rates . . . was intended to serve as recompense for that service." (R. 3822).[2]

After the issuance of the April 3 Order and again after issuance of the May 24 Order, Phillips-Kerr-McGee repeated their demands to Jupiter for payment of all amounts due at 18.5¢ per Mcf, but Jupiter continued to refuse to make such payments. On July 1 and October 16, 1968, Phillips-Kerr-McGee filed motions with the Commission advising it of Jupiter's refusal to make the payments required by the Commission's Orders and requesting it to take appropriate action, as specified in the motions. (R. 3825, 3841).

The Commission acted on these motions in its Order of December 13, 1968. (R. 3868). The Commission again reviewed the history of this case (R. 3868-70), noted the Commission's prior rejection of Jupiter's arguments but that Jupiter continued to ignore the Commission's Orders requiring payment of 18.5¢ per Mcf to Phillips-Kerr-McGee even though no stay of these Orders had been sought by Jupiter (R. 3870-71),

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[2] In these Orders the Commission also determined that Jupiter's transportation of condensate as part of the gas stream is subject to the Commission's jurisdiction. These intervenors will not in this brief deal with the validity of this determination.

entered the formal finding that "The Jupiter Corporation has flouted the terms of the Commission's order of April 3, 1968" (R. 3875), and concluded that, in order for the integrity of this Order to be maintained, it would have to take action directed to Tennessee as well as Jupiter. (R. 3871). The Commission then, in formal ordering paragraphs, reaffirmed Jupiter's preexisting obligation to pay Phillips-Kerr-McGee at the 18.5¢ per Mcf rate and ordered that in the future, in light of Jupiter's intransigence, Tennessee is to pay 18.5¢ per Mcf directly to Phillips-Kerr-McGee on Jupiter's account. (R. 3876).

Jupiter's Petition for Rehearing of the December 13 Order was denied by the Commission's Order of January 22, 1969 (R. 3903), in which the Commission rejected Jupiter's contentions as to the invalidity of the December 13 Order.

Similarly, Jupiter's efforts to stay the Commission Orders under review have been rejected by the Commission (Order of January 22, 1969 (R. 3903)) and by this Court. (Order of February 6, 1969).

ARGUMENT

I. THE COMMISSION PROPERLY REQUIRED PAYMENT BY JUPITER AT THE RATE OF 18.5¢ PER MCF

Jupiter contends that the Commission's April 3 Order did not require it actually to pay Phillips-Kerr-McGee 18.5¢ per Mcf but, instead, permitted Jupiter to offset from this rate amounts which it claims are due it for nonjurisdictional services, services which by contract are to be provided "free of cost and expense to Phillips and Kerr-McGee." (R. 1434). We have already pointed out that Jupiter is clearly in error in so construing this Order, and there is no need again

to deal with this point.[3] In any event, even Jupiter now recognizes (Br., p. 11) that the Commission has in fact required it to pay 18.5¢ per Mcf, and the issue is whether the Commission erred in so doing. There was no error.

A. The Commission Did Not Exceed Its Jurisdiction

Jupiter argues (Br., pp. 12-17) that, because the Commission recognized that Jupiter performs some nonjurisdictional services, it was required to permit Jupiter to set off from the 18.5¢ per Mcf rate the amount which Jupiter claims is due it for these nonjurisdictional services. Whether Jupiter is due any compensation for such services and, if so, its amount are common law reformation-of-contract questions which the Commission has stated are now before the Cook County Circuit Court.[4]

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[3] *See* "Opposition of Intervenors Phillips Petroleum Company and Kerr-McGee Corporation to Motion for Stay," pp. 11-14, filed January 9, 1969. As there discussed, the wording of the April 3 Order, especially the Ordering paragraph (*see* p. 9, *supra*), is clear and explicit and makes no provision for any claimed set-off. Moreover, if the Commission had intended to permit Jupiter to continue its set-off practice, the Commission would have so indicated expressly, especially since that practice deviates from the well-established filed rate doctrine. *See* pp. 13-16, *infra*. In addition, Jupiter itself recognized in its Petition for Review in this Court (pp. 15-16) that its interpretation of the April 3 Order might be incorrect.

[4] As the Commission noted in its December 13 Order (R. 3870) and as Jupiter conceded in its original offer of settlement (R. 3338; *see* p. 7, *supra*), reformation of the contract between Phillips-Kerr-McGee and Jupiter by a court of equity would be required in order for Jupiter to be entitled to any compensation for its nonjurisdictional services. For this contract, which the Commission reviewed in connection with Opinion No. 470 and the Jupiter settlement case (*see* Order of January 22, 1969 (R. 3905)), provides ex-

We submit that it is obvious that there has been no abuse of Commission discretion, especially in the circumstances of this case, in requiring Jupiter to pay the filed rate without any claimed set-off. Indeed, the Commission would have erred had it permitted such a set-off.

It is, of course, a basic principle of administrative law—the filed rate doctrine—that the tariff or rate duly approved by a regulatory commission must be observed in full.

> "The tariffs are both conclusive and exclusive; they may not be added to through reference to outside contracts or agreements or understandings or promises." *United States* v. *Associated Air Transport, Inc.,* 275 F.2d 827, 833 (5th Cir. 1960).

See also Lowden v. *Simonds-Shields-Lonsdale Grain Co.,* 306 U.S. 516 (1939); *Compania Anonima Venezolana De Nav.* v. *A. J. Perez Exp. Co.,* 303 F.2d 692, 696 and n.12 (5th Cir. 1962), *cert. denied,* 371 U.S. 942 (1962); *Bernstein Bros. Pipe & Machine Co.* v. *Denver &R.G.W.R.R.,* 193 F.2d 441, 444 (10th Cir. 1951);

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plicitly that these services are to be "free of cost and expense to Phillips and Kerr-McGee":

> "7. *Separation and Delivery of Condensate:*
>
> "(a) [Jupiter] shall accept, along with the gas delivered hereunder, the condensate produced with such gas, and gather any such combined gas and condensate to a point on shore where [Jupiter] shall erect, install, maintain and operate at its sole cost, risk and expense a plant to mechanically separate the condensate from the gas delivered hereunder, and [Jupiter] shall, in addition to the payment of the amounts payable to Phillips and Kerr-McGee under the other provisions of this contract, deliver to Phillips and Kerr-McGee, free of cost and expense to Phillips and Kerr-McGee, in storage to be furnished by Phillips and Kerr-McGee, all of the condensate and liquid hydrocarbons so recovered." (R. 1433-34).

American R.R. Exp. Co. v. *American Trust Co.,* 47 F.2d 16 (7th Cir. 1931), *cert. denied,* 284 U.S. 629 (1931); *Louisville & N. R.R.* v. *Dickerson,* 191 F. 705 (6th Cir. 1911). No act of the carrier can preclude it from enforcing payment of the appropriate rate in full. *Atchison, T. & S.F. Ry.* v. *Bouziden,* 307 F.2d 230 (10th Cir. 1962). For example, carriers cannot be estopped by their initial failure to state the correct rate, despite any resulting inequity. *Pitts Co., C. & St.L. R.R.* v. *Fink,* 250 U.S. 577 (1919); *Kansas City S. R.R.* v. *Carl,* 227 U.S. 639, 653 (1913). Nor will equitable considerations of any kind suffice as a defense. *Baldwin* v. *Scott County Milling Co.,* 307 U.S. 478, 485 (1939).

This principle that rates filed with the appropriate regulatory body must be fully and literally complied with is of course applicable to the Federal Power Commission (*Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.,* 341 U.S. 246, 251 (1951)) and calls for rejection of Jupiter's claim that it should be permitted a set-off from the filed rate based on its disputed claim for compensation.

If, as Jupiter would have it in this case, the mere assertion of a claim is permitted to excuse noncompliance with a filed rate, the filed rate could be ignored at will because its collection could be delayed interminably. Refusal for an indefinite period to pay a supplier at the proper rate unnecessarily threatens the integrity of the filed rate by conditioning it on the vicissitudes of future and probably protracted litigation. The obligation to pay the filed tariff is too important and too clear to be made contingent upon the validity of a claim asserted by a shipper or purchaser as a set-off from the filed rate, where it may take years

for the validity of that claim to be determined but where there is no dispute as to the appropriate filed rate. Any such postponement of payment of tariffs places upon the seller the risk of the buyer's insolvency and unfairly imposes on the supplier the cost of litigation to procure what the Act guarantees him. Moreover, it complicates any effort by the Commission to monitor both the industry and the parties directly involved for purposes of any future determinations it may have to make to fulfill its manifold responsibilities under the Natural Gas Act.

To permit a set-off would be particularly objectionable in the natural-gas area in light of the requirement in Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), that prior Commission approval must be obtained in order to abandon a sale to any buyer. Thus, if set-offs were permitted, a buyer with the flimsiest of claims could simply refuse to pay a substantial part, or all, of the filed rate, and the seller—unlike a carrier, for example, who could refuse to permit the use of his facilities by any person who claimed a set-off right—would be required to continue to sell the gas unless and until the Commission permitted the seller to stop deliveries of the gas. Self-help by the buyer should not be permitted where self-help by the seller is precluded.

In addition, if the assertion of a claim is sufficient to excuse noncompliance with the filed rate, opportunities would be created for preferential or discriminatory arrangements for the sale of natural gas, contrary to the mandate of Section 4(b) of the Natural Gas Act, 15 U.S.C. § 717c(b). Enforcement of the filed rate doctrine is relied upon to eliminate the possibility

of any such discriminatory arrangements. *Louisville & N. R.R.* v. *Mottley,* 219 U.S. 467 (1911); *Merchants Warehouse Co.* v. *United States,* 283 U.S. 501 (1931); *United States* v. *Associated Air Transport, Inc.,* 275 F.2d 827 (5th Cir. 1960).

Finally, there are compelling reasons for the Commission's refusal to give effect to Jupiter's claim of a set-off in this instance. First of all, there is the history of the Commission's efforts to regulate Jupiter and require a reduction of its 2.4¢ per Mcf "spread"; it would have been unthinkable for the Commission to permit a set-off which, to all intents and purposes, would have reinstituted this "spread," already found to be unjust and unreasonable.

Second, as the Commission recognized in the Orders now before this Court (R. 3735; R. 3822; R. 3870), the nonjurisdictional services performed by Jupiter (even categorizing transportation of condensate as nonjurisdictional, as Jupiter contends) are quite minor as compared to the jurisdictional services; it would thus have been unreasonable for the Commission to permit a set-off of 1.4¢ per Mcf for these minor services when the Commission-approved "spread" for Jupiter's "major function" (R. 3822) is only 1¢ per Mcf. We have already noted (p. 7, *supra*) that even Jupiter originally put a price tag of only .25¢ per Mcf on these other services, and it is now contending for a set-off of almost six times this amount. The Commission can hardly be said to have erred in rejecting this contention.

B. The Mobile Doctrine Did Not Preclude the Commission's Orders

Jupiter argues (Br., pp. 21-24), invoking *United Gas Pipeline Co.* v. *Mobile Gas Serv. Corp.,* 350 U.S. 332 (1956), that the 18.5¢ per Mcf rate is unlawful because it is greater than that contractually set by Jupiter and Phillips-Kerr-McGee.[5] This argument, however, has as its premise a reading of Jupiter's contract urged by it, and rejected, when the Commission reduced Jupiter's "spread." It was properly rejected then, and the argument may not, in any event, be made now as a collateral attack on the Commission's 1965 and 1966 Orders.

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[5] While making this argument, Jupiter argues at the same time (Br., p. 23 n.**) that the Commission, and presumably this Court, cannot determine whether the premise of the argument is correct, *i.e.,* whether the contractual price is in fact less than the ordered price, because, according to Jupiter, this question can be determined only by the Cook County Circuit Court. If this latter question cannot be resolved, as Jupiter argues, then of course its *Mobile* argument must fall, for it has the burden of proving, not merely asserting, the bases for its contention that the Commission's Orders are invalid. In fact, however, there is no bar to the Commission's, and this Court's, reviewing and interpreting private contracts which constitute the relevant rate schedules (*see, e.g.,* Phillips Petroleum Co. v. *FPC,* 258 F.2d 906, 913-14 (10th Cir. 1958)), and there is no dispute that the contracts between Jupiter and Phillips-Kerr-McGee are part of the schedules governing the sale to Jupiter. (*See* Jupiter Br., p. 24). As the Commission stated in its Order of January 22, 1969 (R. 3905):

> "We . . . point out . . . that the contract between Jupiter and Phillips-Kerr-McGee is on file with this Commission as the contractual support for Phillips-Kerr-McGee's rate schedule covering the sale of natural gas to Jupiter and is subject to our jurisdiction as such."

The necessary effect of Jupiter's *Mobile* argument is that the Commission can never regulate Jupiter's "spread" because, according to Jupiter, under its contract with Phillips-Kerr-McGee, any reduction in the price it receives from Tennessee necessarily reduces, by the same amount, the price it is contractually obligated to pay Phillips-Kerr-McGee. There are two separate answers to this argument, each of which is sufficient to compel its rejection.

First, there is the answer given by the Hearing Examiner in Jupiter's rate case, where the same argument was made. 35 F.P.C. at 1120-22. (R. 3167-70). The Examiner pointed out that the argument overlooked an amendment to the basic contract between Jupiter and Phillips-Kerr-McGee (Supplement No. 2 (R. 1477-82)), one provision of which reads as follows:

> "[I]f at any time and for any reason Marine [now Jupiter] is required to reduce the amount per Mcf specified . . . as the adjustment to be made to the applicable price . . . then . . . the price payable to Phillips and Kerr-McGee . . . shall not thereby be reduced, but shall be increased by an amount per Mcf equivalent to the amount per Mcf by which such [adjustment] amount . . . is reduced, to the end that Phillips and Kerr-McGee will receive for gas delivered . . . the applicable price per Mcf less only the amount per Mcf to which said [adjustment] amount . . . is reduced. . . ." (R. 1480-81).

The Examiner concluded that this provision required rejection of Jupiter's argument that its contractual "spread" could not be affected by that proceeding. Applying the Examiner's reading of the contract in light of the rate reductions in the Commission's June

1966 Order, it is clear that Jupiter's contractual rate did not become 17.1¢ per Mcf, as Jupiter now argues.[6]

Second, the Examiner failed to note that, under Jupiter's contract with Phillips-Kerr-McGee, the amount payable by Jupiter does *not* depend upon the amount actually received by Jupiter from Tennessee but rather upon the amount Tennessee agreed to pay Jupiter, "regardless of whether or not such price is actually paid." (R. 1442). The reduction ordered by the Commission in its 1966 Order in the price to be paid by Tennessee did *not*, therefore, reduce the contract price payable by Jupiter.[7] That reduction was

[6] The arithmetic is not difficult. As noted (pp. 3-4, *supra*), prior to the Commission Orders, under the contract the "applicable price" was 21.3333¢ per Mcf and the adjustment was 2.4¢ per Mcf, so that the amount payable by Jupiter was 18.9333¢ per Mcf (21.3333¢ minus 2.4¢). The Commission reduced the price paid by Tennessee to 19.5¢ per Mcf and Jupiter's "spread" to 1.0¢ per Mcf. 35 F.P.C. at 1094. (R. 3409). Under the Examiner's reading of the contract, even if this Order had the effect of reducing the "applicable price" to 19.5¢ per Mcf so that absent the provision quoted in the text the contractual price payable by Jupiter would be reduced to 17.1¢ per Mcf (19.5¢ minus 2.4¢), Jupiter's argument would not prevail. For under the quoted provision, the price otherwise payable by Jupiter must be increased to reflect the reduction in the contractual "spread" (*i.e.*, it must be increased by 1.4¢ per Mcf), so that the contractual price becomes 18.5¢ per Mcf, the price ordered in Opinion No. 470.

[7] In fact, the contract price payable by Jupiter was increased, when effect is given to the contract provision quoted in the text at p. 18, *supra*. Prior to the Orders, the situation was 21.3333¢ ("applicable price") minus 2.4¢ (contractual "spread") equals 18.9333¢ (price payable by Jupiter). The 1966 Order did not change the "applicable price" under the contract, but the amount payable by Jupiter (18.9333¢ per Mcf) was increased by an amount (1.4¢ per Mcf) equal to the ordered reduction in its "spread," so that the contractual price payable by Jupiter became 20.3333¢ per Mcf.

Phillips-Kerr-McGee recognize, of course, that Opinion No. 470 which reduced the price payable by Jupiter to 18.5¢ per Mcf

not agreed to as a matter of contract by Tennessee, nor was it agreed to by Phillips-Kerr-McGee, whose written consent was contractually required. (R. 1450).

It is thus clear that, on the merits, Jupiter's *Mobile* argument is not sound. It is, moreover, also clear that the argument is not even available to Jupiter in this proceeding. The 18.5¢ per Mcf rate about which Jupiter complains was set by the Commission in Opinion No. 470, as Jupiter recognized at the time. *See* p. 5, *supra*. Jupiter claims (erroneously, as has been shown) that that rate was made unlawful when the Commission, by order in Jupiter's rate case, specified the rate to be paid by Tennessee and the "spread" to be retained by Jupiter. At that time, however, when it was in its interest to do so, Jupiter was on record as acknowledging that the 18.5¢ per Mcf rate could be billed under the contract. *See* p. 7, *supra*. In any event, without regard to Jupiter's admission, the fact is that both of these Orders are now final and not appealable. Jupiter cannot now launch a collateral attack on these Orders in a separate, subsequent proceeding. *See FPC* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 502 (1955); *Pan American Pet. Corp.* v. *FPC,* 268 F.2d 827 (10th Cir. 1959).[8]

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does not permit them to collect the full contractual price, a result dictated in any event by § 10(e) of the basic contract with Jupiter, which provides (R. 1445):

> "In the event Phillips and Kerr-McGee's ceiling price, during any billing period, is less than the prices herein provided, Phillips and Kerr-McGee will accept and Marine [now Jupiter] shall pay such ceiling price."

[8] Similarly, Jupiter's contention that a reduction in its "spread" should not be ordered because it would not benefit the public was argued at length, and rejected, in its rate case, as well as in other litigation instituted by Jupiter. *See* Jupiter Corp. v. FPC, 362 F.2d 92 (7th Cir. 1966).

C. There Is No Conflict With Orders of the Cook County Circuit Court

Jupiter also argues (Br., pp. 17-21) that the Commission's requirement that it pay at the 18.5¢ per Mcf rate is invalid because, Jupiter claims, it conflicts with action taken by the Cook County Circuit Court. There is, however, no such conflict.

The Commission was very careful in leaving to the Cook County Circuit Court final decision of the issue of Jupiter's right to any compensation for its nonjurisdictional services. It is the appropriate rate for Jupiter's jurisdictional activities that was recognized by the Commission. The jurisdictional and nonjurisdictional issues are confused by Jupiter because it insists on ignoring all precedent to the contrary and assuming that filed rates may be subject to set-offs for amounts merely claimed to be due by a purchaser or shipper for nonjurisdictional services. Under the rate duly fixed by the Commission, as the Commission has repeatedly advised Jupiter, Jupiter has a duty to pay Phillips-Kerr-McGee 18.5¢ per Mcf. The filed rate doctrine prevents anyone, including the Cook County Circuit Court, from altering this duty on the basis of a disputed claim. *See Montana-Dakota Util. Co., supra,* 341 U.S. at 251:

> "[Petitioner] can claim no rate as a legal right that is other than the filed rate whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms."

All the Cook County Circuit Court decided was that the case before it would not, at the most preliminary stage, be dismissed as within the primary jurisdiction of the Commission. It also held that until the nonjurisdictional contract question is finally litigated, it

would not provide remedial relief by requiring an escrow account, but instead would leave the parties to their own devices until the merits of the case are decided. As pointed out above (p. 8, *supra*), this preliminary ruling was made after an argument by Jupiter that, under Illinois law, that court lacked the authority to require an escrow account. (*See* the Appendix hereto, pp. 31-34, *infra*).

That court most certainly has not made any ruling, nor could it rule, that the Commission could take no action on the question of whether Jupiter was meeting its responsibilities in connection with its jurisdictional activities. Nor did the Cook County Circuit Court rule that the Commission could not continue to implement the Natural Gas Act in connection with this matter pending resolution of the nonjurisdictional contract issue by that court. When a court denies a motion to dismiss contending that the Commission has primary jurisdiction, the court does no more than decline to decide at such an early stage in the litigation any substantive question of jurisdiction one way or the other. *See, e.g., Kansas-Nebraska Natural Gas Co.* v. *City of Hastings,* 10 F.R.D. 280 (D. Neb. 1950). The court most certainly does not decide that it has exclusive jurisdiction.[9]

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[9] Jupiter is in error when it contends that the action of the Cook County Circuit Court is to be given res judicata effect. It is hornbook law, applied in Illinois, that for res judicata to apply an order must be final or appealable. Washington Bldg. Services v. United Janitorial Services, 122 U.S. App. D.C. 202, 206, 352 F.2d 678, 682 (1965); Impey v. City of Wheaton, 60 Ill. App. 2d 99, 208 N.E. 2d 419 (1965); Peach v. Peach, 73 Ill. App. 2d 72, 218 N.E. 2d 504 (1966); People v. Kidd, 398 Ill. 405, 75 N.E. 2d 851 (1947). It is also clear that the Cook County Circuit Court's ruling does not meet this test. Sachs v. Ohio Nat'l Life Ins. Co., 148 F.2d 128 (7th Cir. 1945); LaSalle Nat'l Bank v. Little Bill "33" Flavors Stores, 80 Ill. App. 2d 298, 225 N.E. 2d 465 (1967); Smock v. Williamson, 80 Ill. App. 2d 218, 223 N.E. 2d 741 (1967).

It is apparent that opportunity for abuse would be great if it were necessary for the Commission to suspend completely its regulation of a natural-gas company because of state-court litigation that touches only incidentally on the merits of the case before the Commission. There is no authority for Jupiter's novel argument that would lead to this result. The Commission case relied on by Jupiter, *Pan American Pet. Corp.,* 32 F.P.C. 966 (1964), *reconsideration denied,* 32 F.P.C. 1394 (1964), not only does not support Jupiter's argument but actually undercuts it.

The Commission there made it very clear that state-court litigation does not require the Commission to suspend its proceedings already underway unless it chooses as a matter of discretion to do so. 32 F.P.C. at 967-68, 1395. That case emphasized that the initiation of state-court litigation can in no way affect the Commission's power to act on jurisdictional matters pending before it. *Ibid.* Here, the Commission determined that certain contract questions should be decided by the Cook County Circuit Court but that it need not defer action on jurisdictional matters, pending before it since December 1962, while that lawsuit wends its way through the Illinois state-court system. There is no difficulty in reconciling the Commission's action with that of the Cook County Circuit Court.

II. THE DECEMBER 13 ORDER IS A VALID EXERCISE OF THE COMMISSION'S AUTHORITY

The Order of December 13 was issued by the Commission after Jupiter had filed in this Court its Petition to Review the April 3 and May 24 Orders of the Commission. Jupiter, however, without seeking a stay of these Orders, was simply ignoring their requirement that it pay Phillips-Kerr-McGee at the 18.5¢ per Mcf

rate. When Jupiter's flouting of these Orders was brought to the Commission's attention, the Commission entered its Order of December 13, reaffirming the prior Orders and, because of Jupiter's repeated failure to itself honor its Commission-ordered obligations, directing Tennessee to pay the 18.5¢ per Mcf rate to Phillips-Kerr-McGee on Jupiter's account. The Commission committed no error.

A. The Commission Did Not Preempt This Court's Exclusive Jurisdiction

It is clear, as Jupiter contends, that when the Commission issued its December 13 Order this Court had exclusive jurisdiction under Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), "to affirm, modify, or set aside" the Orders of April 3 and May 24. It is also clear, however, that the December 13 Order did not modify, but rather reiterated and implemented, the earlier Orders. *See* Order of December 13 (R. 3871); Order of January 22, 1969 (R. 3906).

In reasserting its prior Orders, the Commission was well within its authority. The Natural Gas Act, § 19(c), specifically provides that the commencement of judicial review proceedings "shall not, unless specifically ordered by the court, operate as a stay of the Commission's order." As of December 13, 1968, Jupiter had not requested and this Court had not granted any stay of the Commission's Order of April 3. Consequently, the Commission's authority and responsibility to assure compliance with that Order pending review in this Court were clear. *See Dyer* v. *SEC*, 289 F.2d 242 (8th Cir. 1961) (exclusive jurisdiction of court of appeals to modify SEC order did not deprive SEC of jurisdiction to implement and give effect

to order then pending review since effectiveness of order had not been stayed).

Any contrary ruling would mean that the courts of appeals, rather than the regulatory agencies, would be faced with the responsibility of assuring compliance with agency orders pending appeal. This Court certainly would not welcome this obligation, and there is no reason why it should not be borne by the regulatory agencies, as Congress obviously intended.

B. The December 13 Order Was Authorized by Section 16 of the Natural Gas Act

The Commission is authorized, under Section 16 of the Act, 15 U.S.C. § 717*o*, "to . . . issue . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act." It cannot seriously be contended that this section did not empower the Commission to issue an order, not barred by any other statutory provision, designed to insure compliance with other issued but unheeded orders.

Section 16, as well as other similar provisions in the organic statutes of other agencies, has been construed not as a meaningless generality but rather as an affirmative source of authority to permit the use of techniques of regulation not otherwise referred to in the Act. As this Court stated in *Public Serv. Comm'n* v. *FPC,* 117 U.S. App. D.C. 195, 199, 327 F.2d 893, 897 (1964):

> "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such con-

> frontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. See American Trucking Ass'n v. United States, 344 U.S. 298 . . . (1953); National Broadcasting Co. v. United States, 319 U.S. 190, 217-221 . . . (1943)."

See also Permian Basin Area Rate Cases, 390 U.S. 747, 776 (1968); *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 180-81 (1968).

This authority based on statutory provisions such as Section 16 is greatest where—as is the case here—its exercise is in the remedial area, where an agency determines to adopt a remedy which it believes necessary to insure compliance with substantive obligations. Again, this Court has spoken to this point:

> "[W]e observe that the breadth of agency discretion is, if anything, at zenith, when the action assailed relates primarily not to the ascertaining of whether conduct violates the statute . . . but rather to the fashioning of policies, remedies, and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of congressional objectives." *Niagara Mohawk Power Corp.* v. *FPC,* 126 U.S. App. D.C. 376, 382, 379 F.2d 153, 159 (1967).

See also Consolo v. *Federal Maritime Comm'n,* 383 U.S. 607, 620-21 (1966); *Fibreboard Paper Prods. Corp.* v. *NLRB,* 379 U.S. 203, 215-17 (1964); *FCC* v. *WOKO, Inc.,* 329 U.S. 223, 227-28 (1946).

The *Niagara Mohawk* case bears on the legality of the Commission's Order here in yet another way, for there this Court upheld Commission action imposing

special conditions on licenses to utilities that had been recalcitrant in the past:

> "This reasonable exercise of administrative authority is not to be gainsaid by maxims that are good enough as generalities but do not undercut the kind of actions under review. Thus, an agency's authority to impose penalties may not be lightly inferred, but the term 'penalty' is hardly appropriate for a condition that puts the wrongdoer in no worse stance than the company that has punctiliously observed the requirements of law, ..." 126 U.S. App. D.C. at 382, 379 F.2d at 159.

This Court's holding is pertinent here in light of Jupiter's failure to comply with the prior Commission Orders.

Duke Power Co. v. *FPC,* —— U.S. App. D.C. ——, 401 F.2d 930 (1968), cited by Jupiter (Br., p. 28), is not contrary to these lines of authority. The question there concerned the authority of the Commission to require interstate utilities acquiring facilities utilized in the local distribution of electric energy to obtain the Commission's prior approval. The opinion, asserting that the grant of jurisdiction to the Commission must be read strictly in light of its legislative history, held that the Federal Power Act did not grant the Commission the authority to monitor such acquisitions. The Court in this context observed that the Commission had available alternative means to exercise control over the finances and accounting practices of the interstate utility.

The Commission's Order of December 13 obviously does not raise problems either of the same nature or magnitude. For the Commission's choice of remedies will not affect the Commission's jurisdictional limits.

It is merely attempting to effectively administer and implement action already taken by it, regulation of Jupiter's "spread," under authority granted it by the Natural Gas Act. In so doing, the Commission has the discretion to choose among available regulatory tools.

> "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the congressional objective." *Philadelphia Television Broadcasting Co.* v. *FCC,* 123 U.S. App. D.C. 298, 300, 354 F.2d 282, 284 (1966).

In the case of the Natural Gas Act, there is no statutory denial of such discretion. There is no indication that the Commission's authority to institute mandamus proceedings under Section 20 of the Act, 15 U.S.C. § 717s, a provision written in permissive terms, was intended to be the only remedy available to the Commission to secure compliance with its orders. The Commission's choice of an administrative resolution did not and does not deprive Jupiter of its right to challenge in a judicial forum the underlying Commission action, a right which the Commission states Jupiter would have in a mandamus proceeding, and thus there is no real basis for asserting the unreasonableness or inequity of the Commission's choice of remedy.

C. The Commission Did Not Violate the Filed Rate Doctrine

The difficulty the Commission has encountered in attempting to protect the integrity of its Orders arose from Jupiter's contention that it has the right to set off alleged amounts owed it from the 18.5¢ per Mcf

rate. Jupiter continues in this case to ignore the filed rate doctrine. Nevertheless, Jupiter now seeks to argue at the same time that the action by the Commission to enforce its own Orders is invalid because it violates that doctrine by requiring Tennessee to make payments directly to Phillips-Kerr-McGee. (Br., p. 26).

The Order of December 13 does not suffer from any such infirmity.

That Order does not change the parties' basic contractual rights and duties. The amount of Jupiter's "spread" is not affected. The Order simply alters the method and manner of payment, not the rates themselves.[10]

Moreover, the filed rate doctrine Jupiter inconsistently seeks to rely upon has never been applied as a bar to action by the Government. As has been discussed, a basis for the doctrine was the fear that set-offs could be used to discriminate among customers or otherwise undermine the integrity of the rate. When the Commission orders a realignment of the method by which regulated companies meet their responsibilities under the filed rate, the danger that discriminatory rates will result is obviously not a real one. The filed rate doctrine cannot have the effect, as Jupiter would have it, of denying to the Commission the very flexibility it needs if it is to preserve that doctrine against attempted inroads by private parties.

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[10] Jupiter is incorrect when it states (Br., p. 24) that "the Commission now purports to require that Tennessee purchase directly from Phillips-Kerr." Under the Commission's Order Tennessee still purchases the gas from Jupiter; part of its payment for this gas is made to Phillips-Kerr-McGee on the account of Jupiter. *See* Order of January 22, 1969 (R. 3909).

The "somewhat unusual" Order of December 13 (R. 3875) is amply justified by the unique circumstances here of Jupiter's failure to abide by Commission Orders specifying the rate it is to pay Phillips-Kerr-McGee for natural gas purchased by it, a transaction concededly subject to the Commission's jurisdiction.

CONCLUSION

The Commission's Orders should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATE OF ILLINOIS }
COUNTY OF COOK } SS

IN THE CIRCUIT COURT OF COOK COUNTY

No. 67 L 12177
IN LAW

THE JUPITER CORPORATION, a Delaware Corporation,
Plaintiff,

vs.

PHILLIPS PETROLEUM COMPANY, a Delaware Corporation and KERR-McGEE CORPORATION, a Delaware Corporation,
Defendants.

MEMORANDUM IN OPPOSITION TO ESCROW REQUIREMENT

1. On January 12, 1968, this Honorable Court denied the Motion of Defendants to Dismiss or Stay these proceedings on "primary jurisdiction" grounds. Attached hereto, for the information of the Court, is a copy of a recent Order of the Federal Power Commission, which fully supports this Court's January 12 ruling. In that case, the Commission reaffirmed its policy not to interfere in contract disputes pending in a Court of competent jurisdiction, and also reaffirmed its lack of jurisdiction over activities relative to hydrocarbons, other than natural gas.

2. In its January 12, 1968 Order, this Court directed Natural to continue to tender to defendants, the amount which Natural agrees is due to defendants for gas sold to Natural, and pursuant to such Order, defendants are now accepting such amounts.

3. Defendants also seek to require that Jupiter deposit into escrow, the amounts which now, and each month here-

after, represent the difference between the amount which defendants believe is due to them and the lesser amount which Jupiter believes is due. Jupiter is opposed to such requirement. The requested escrow obligation would impose upon Jupiter a requirement of banking mechanics which is burdensome, without any counteravailing benefit to defendants. Further, it would create accounting complications, for financial statement purposes. It would also impose limitations upon the use of such funds, which would cause loss of revenue.

There is no requirement in the Illinois statutes, so far as Jupiter is aware, for escrow of amounts in contest in litigation in a situation like the instant case, nor any court rule so providing. Research has disclosed only Section 1 of Chapter 33 of the Illinois, which does not cover the factual situation involved herein, and also relates to security for costs, not escrow of amounts in contest. That statutory provision is mentioned here only because even such a limited provision has been strictly construed. See *Kolbe* v. *Illinois,* 85 Ill. 366 (1877) *and Town of Lewiston* v. *Proctor,* 23 Ill. 533 (1860), *Johnson* v. *Huber,* 34 Ill. 527 (1890), *Federal Insurance Co.* v. *Ainsworth,* 31 Ill. App. 2d 19 (1961), *Cramer* v. *Illinois Commercial Men's Ass'n,* 176 Ill. App. 1 (1912); *Plaff* v. *Pacific Ex. Co.,* 251 Ill. 243 (1911); *Palmer* v. *Riddle,* 180 Ill. 461 (1899).

In the absence of statute or Court Rule, the following passage from *Van Brandt* v. *Osterlund,* 351 Ill. App. 556 (1953) is relevant:

> "One of the grounds argued was that the cross-appellants since they were non-residents were required to enter security for costs. This motion was taken with the case. A cost bond can *only be required by statute, by rule of Supreme Court, or by rule of this court.* We find no statute or rule requiring such a bond." (emphasis added)

In that case, security was not required of a non-resident. Jupiter is a resident. In addition, there is no showing—or, indeed, even any allegation—that Jupiter is insolvent. It is only in cases of non-residency or insolvency that Illinois Supreme Court Rule 53 (110A Ill. Rev. Stat. 1967 § 364) requires a bond on appeal. Again, this inapplicable provision is cited only to show that no authority exists for the escrow requested by defendants herein.

It is also relevant to note that the above "security for costs" provisions restate common law requirements. Research has failed to disclose any common law requirement for escrow of amounts in controversy.

A requirement of escrow of the funds in controversy in these proceedings—funds which Jupiter contends are not due and owing—would be analogous to the efforts of parties in the following cases to require that persons contesting the validity of tax sales of realty must pay or tender the back taxes as a precondition to the litigation. See *Senicha* v. *Lowe,* 74 Ill. 274 (1874), *Reed* v. *Tyler,* 56 Ill. 288 (1870) and *Wilson* v. *McKenna,* 152 Ill. 43 (1869). In each of those cases, the Court held that such advance tender requirement would be violative of Section 19 of Article II of the Illinois Constitution, which provides that "Every person ought to find a certain remedy in the laws for all injuries and wrongs . . . and without being obliged to purchase it."

In view of the foregoing, Jupiter respectfully requests this Honorable Court to deny the Motion of defendants herein, filed January 9, 1968, insofar as it seeks to require escrow of funds by Jupiter.

Respectfully submitted,

THE JUPITER CORPORATION, *Plaintiff*

By ______________________________

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